

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE

AFL WEB PRINTING

and

Case 22-CA-29494

LOCAL ONE-L AMALGAMATED LITHOGRAPHERS  
OF AMERICA, GCC/IBT

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New York, New York for the Charging Party.

DECISION

Statement of the Case

Steven Fish, Administrative Law Judge. Pursuant to charges and amended charges filed by Local One-L Amalgamated Lithographers of America, GCC/IBT, herein called the Union, on various dates between June 17 and September 28, 2010,<sup>1</sup> the Director for Region 22 issued a complaint and notice of hearing on January 28, 2011, alleging that AFL Web Printing, herein called Respondent, violated Sections 8(a)(1) and (3) of the Act by threatening its employees with plant closure if they selected the Union as their collective bargaining representative and by laying off six employees, Kevin Cole (Cole), Robert Mattei (Mattei), Joseph Wallace (Wallace), Christopher Amato (Amato), Henry Ball (Ball) and Richard Fego (Fego), because these employees assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

The trial with respect to the allegations raised in said complaint was held before me in Newark, New Jersey on May 2, 3, 4 and 5, 2011.

Briefs have been filed by General Counsel and by Respondent and have been carefully considered. Based upon the entire record, including my observations of the demeanor of the witnesses, I make the following:

Finding of Facts

I. Jurisdiction and Labor Organization

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<sup>1</sup> All dates, hereinafter referred, are in 2010 unless otherwise indicated.

Respondent is engaged in the business of commercial printing at a facility in Secaucus, New Jersey.

5 During the twelve months preceding the issuance of the complaint, Respondent provided printing services valued in excess of \$50,000 directly to customers located outside the State of New Jersey, including the Village Voice.

10 Respondent admits, and I so find, that it is and has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

## II. Respondent's Operations

15 Respondent was previously owned by the Forchic Family with Dennis Forchic as its president and chief operating officer.

20 Initially, Respondent operated out of a facility in Voorhees, New Jersey. In 2007, Respondent opened an additional facility in Secaucus, New Jersey and purchased a new DGM printing press. Respondent invested heavily in the huge state of the art press for the Secaucus facility. It took six to nine months to install the presses. The Secaucus facility first began running jobs in the beginning of 2008.

25 James Hager (Hager) was employed by Respondent as its vice-president of operations since 2001. Susan Cohen (Cohen) was Respondent's director of human resources in 2009 and 2010 and was promoted to vice-president of human resources in December of 2010. Ken Rittereiser was employed as Respondent's operations manager of its Secaucus facility since October of 2007.

30 During the installation of the DGM press, which, as noted, took from six to nine months, the installation team from DGM included Chip McNair, Mike Valentine and Ken Kanniard.

Respondent hired Valentine and McNair as admitted supervisors and Kanniard as a trainer.<sup>2</sup>

35 In late February of 2010, Respondent was sold to a group of investors, but Forchic stayed on as president until July of 2010 when the new owners turned control of the company to CGD, a restructuring company. Hager stayed on as vice-president of manufacturing, but after July of 2010 reported to various individuals employed by CGD.

## 40 III. The Status of Kanniard

45 As noted above, Kanniard has previously been employed by DGM as a mechanic and while employed by DGM helped to install the press purchased by Respondent from DGM at Respondent's Secaucus facility. Sometime in 2009, Rittereiser recommended that Respondent hire Kanniard as a trainer because the new equipment was expensive and complicated and he felt that it would be beneficial for Respondent to utilize Kanniard's skills and experience in installing and operating the DGM press to increase the productivity and technical skills of

50 <sup>2</sup> Respondent admits that Kanniard was promoted to supervisor on October 5, 2010. The complaint alleges that Kanniard has been an agent of Respondent since November of 2009 and a supervisor since June of 2010. His status will be discussed more fully below.

Respondent's employees.

Kanniard subsequently had a phone interview with Forchic during which Kanniard agreed to become an employee of Respondent as a trainer at a salary of \$72,000 per year as an exempt employee. Since Kanniard lived in Saratoga Springs, New York and did not want to move his family, he negotiated with Forchic an agreement that Respondent would pay for an apartment for him for one year that he might have to share with another employee in the Secaucus area. The terms of his employment were confirmed by letter dated September 29, 2009 from Cohen and he started work for Respondent on October 2, 2009.

Shortly thereafter, Respondent also hired McNair and Valentine, who had also been DGM employees and who also had some involvement in the installation of the presses. Valentine had been employed as a supervisor at DGM, and he was hired by Respondent as the plant manager at Secaucus. McNair had been employed by DGM as an installer, but Respondent hired him as a pressroom supervisor. McNair and his family lived in Kentucky, so McNair, as part of his compensation package with Respondent, was able to obtain Respondent's agreement to pay for a shared apartment for him for one year. Since McNair and Kanniard knew each other as fellow employees at DGM, McNair shared the apartment, paid for by Respondent, with Kanniard.

There is no record evidence that Respondent paid for the apartment for any other of its employees. It is also undisputed that employees of Respondent were aware of this living arrangement between Kanniard and McNair.

Kanniard, as noted, was hired as a "trainer." The job description for that position is set forth in full as follows:

JOB TITLE: PRESSROOM TRAINER  
DEPARTMENT: PRESSROOM  
JOB CATEGORY: EXEMPT

**GENERAL DESCRIPTION:**

The Pressroom Trainer is responsible to help develop AFL's pressroom staff under the guidelines of the AFL Technical Training Manual. This is a "Hands on" position with the expectation that the position will actively participate in daily production and maintenance activities while helping to train other pressroom personnel.

**FUNCTIONS:**

In executing his/her responsibilities, they will be expected to perform the following functions, as well as other tasks, which may be assigned.

**RESPONSIBILITIES:**

- Have a complete understanding of policies and procedures as outlined [in] the AFL Technical Training Manual.
- Perform on the job training of pressroom personnel in accordance with AFL technical training Manual.
- Offer input on ways to improve our training policies.
- "Hands on position" The Pressroom Trainer will be expected to actively participate in daily production.
- Perform press preventative maintenance as required.
- Train other pressroom personnel to properly perform preventative

maintenance tasks.

- Documentation of all PM as required by Pressroom Manager.
- Weekend coverage required.
- Understand and insure AFL quality control processes are met.
- Meet and exceed AFL's benchmarks for waste, throughputs and quality.
- The cleanliness and orderliness of all areas and equipment.
- Maintains a safe work environment and understands and maintains OSHA, EPA and equipment safety requirements.
- Cooperates fully with all other departments at AFL Web Printing.

#### QUALIFICATIONS:

- Knowledge and Experience
  - Minimum 1 year in a lead operator capacity.
  - Ability to run all AFL printing equipment.
  - Ability to troubleshoot printing problems and minor mechanical and electrical issues on all presses and ancillary equipment.
  - Knowledge of proper press preventative maintenance techniques.
  - Knowledge of SNAP quality specifications.
  - Ability to communicate knowledge to other pressroom personnel.

#### Reporting Relationships

- Position Reports to: Directly reports to shift Supervisor. Pressroom Manager to provide guidance with training implementation.

The record is essentially undisputed that Kanniard performed the functions detailed in the above description, which consisted primarily of training employees in the use of the DGM presses as well as on the preventative maintenance of these machines.

Richard Fego testified that at a meeting, on an unspecified date shortly after Kanniard was hired, Forchic introduced Kanniard to the employees as a trainer supervisor. According to Fego, Forchic explained to the employees that Kanniard would be training new employees and setting up a maintenance program.

I do not credit Fego's testimony to the extent that he asserted that Forchic introduced Kanniard to employees as a trainer supervisor at a meeting. Kanniard credibly denied that Forchic introduced him as a trainer supervisor at a meeting or at any time. Significantly, a number of different witnesses for General Counsel testified about meetings held by Forchic in November of 2009, in which the Union was discussed among other issues. Some of these witnesses also testified to comments made by Kanniard at these meetings<sup>3</sup> and also mentioned that Forchic introduced Kanniard at one of the meetings to the employees. More significantly, none of these employees corroborated Fego's testimony that Forchic introduced Kanniard as a trainer supervisor. Further, I find it unlikely that Forchic would introduce Kanniard as a trainer supervisor. His job description makes no reference to a title of supervisor nor of any supervisory responsibilities for Kanniard. There is no other record evidence that any of Respondent's officials considered Kanniard to be a supervisor.

Based on the foregoing, I do not credit Fego's testimony as to this issue and conclude

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<sup>3</sup> The substance of the comments made by Forchic and Kanniard at these meetings concerning the Union will be discussed more fully below.

that Forchic introduced Kanniard to employees as a trainer, and that is the position that he held and that Respondent considered him to hold until he was promoted to supervisor on October 23, 2010.

5 In addition and often in connection with his responsibilities to train employees, Kanniard would at times operate the presses. He would do so in the process of showing employees how to operate the presses by having them observe him doing so and then observing and correcting the employees when they operated the press.

10 At other times, if employees were out sick or for other reasons, Kanniard would be asked by supervisors to fill in and operate the presses for the entire day. Similarly, other admitted pressroom supervisors, such as Doug Metz, Brad Fredericks and Dan Johnson, would also fill in and operate a press when someone was out from work.

15 In connection with Kanniard's responsibility for training employees on maintenance functions *vis a vis* the presses, a lot of that work took place on weekends when the presses were not operative. In that connection, it was often necessary to pay employees overtime to work on weekends. Respondent did not require any employees to work overtime and overtime was strictly on a voluntary basis. The procedure followed generally was that Respondent posted  
20 a list of available overtime, and employees would sign up if they were interested. These were times, however when despite this list, it was necessary for management to ask employees if they were interested in working overtime, particularly on weekends. Prior to Kanniard's hire, this task would be performed by various supervisors, such as Deska, Fredericks, Johnson and Keith Whitmoyer.

25 After Kanniard was hired, at time, he would ask employees if they were interested in working overtime, and other times, the above named supervisors, when they were still employed by Respondent, would ask employees to work overtime. In this regard, Perez credibly testified that sometimes Kanniard would go around with a piece of paper asking employees to  
30 sign up for overtime. On other occasions, Kanniard would hand Perez a piece of paper, ask Perez to try to obtain signatures for whatever amount of employees that Kanniard needed to work that weekend. In those situations, Perez would comply with Kanniard's instructions and would take the list to employees, ask them if they were interested in working overtime and inform them that Kanniard was asking them if they were available for the overtime.

35 Additionally, in this regard, since the number of employees coming in on weekends was determined, Kanniard would decide the specific times that each employee would come in and so informed each employee of the particular hours that they would be needed on the weekends.

40 On these weekends, Kanniard had the keys to the facility and a key card with the alarm code, which was necessary to open the building. The employees did not have the alarm code and could not open the facility.

45 With respect to the maintenance work in general, Kanniard recommended to Respondent's officials, Rittereiser and McNair, that Respondent institute a new system of equipment maintenance, which Kanniard believed would be more efficient than the way it was being done. Rittereiser and McNair agreed with Kanniard's recommendations in this regard, and the system was instituted shortly after Kanniard become employed.

50 During this tenure as a trainer, Kanniard would occasionally assign work to the employees, although, primarily these tasks were performed by supervisors, such as Deska, Metz, Johnson, McNair and Fredericks. However, there were times that Kanniard would instruct

an employee to stop a job that he was performing and go over to another press to help when Kanniard believed that help was needed at the presses. These functions would also be performed by the supervisors of Respondent, described above.

5 Employee Edwin Valentin testified that he believed Kanniard was a supervisor because he (Valentin) would go to Kanniard if he needed to leave early or if he needed work assignments. Valentin further testified that he would also go to supervisor Metz or Deska for similar instructions or permission to leave early.

10 When employees worked overtime, as described above, on weekends or otherwise, they were paid overtime, and they punched in and out to record their time on all occasions. Kanniard, as an exempt employee, did not punch a time card, worked on a straight salary and was not paid overtime. Kanniard did not have a set schedule and usually worked as much as seven days a week and averaged 100 hours a week.

15 Kanniard shared an office with operation manager Rittereiser and pressroom manager McNair, where he was responsible for preparing various kinds of paperwork, including signing off on press documents as well as training documents. In the latter regard, Kanniard distributed a self-evaluation form to employees, which he asked them to fill out and which he used to assist him in his training assessments.

20 Shortly after Kanniard first came to work for Respondent in 2009 and after observing the work of Edwin Valentin, Kanniard informed Valentin that he recognized Valentin's work ethics and stated that Valentin had the potential to move up from his then-current position as roll tender to second pressman. Kanniard added that he would put in a recommendation for Valentin if needed.<sup>4</sup>

25 A number of employees referred to Valentine, McNair and Kanniard as the "three amigos." This nickname for these three individuals was commonly referred to by the employees because they were always together at work, hung out together after work, ate lunch together and went to the movies together. According to some employees, they seemed to be "connected at the hip." In this connection, the employees were aware that all three of them formerly worked together at DGM, had helped to install the DGM presses at Respondent and that McNair and Kanniard shared an apartment.

30 Finally, employee Hector Perez injured his knee at work and went on workmen's compensation on April 7, 2010. At that time, Keith Whitmoyer asked Perez if he would forgo going out on compensation and perform light duty. However, the alleged light duty that Whitmoyer offered to Perez (stacking) was not light duty, according to Perez, and he so informed Whitmoyer.

35 During the approximately one month that he was out, Perez received a phone call from Kanniard. Kanniard asked Perez how his therapy was coming along and how he felt. Kanniard also asked when Perez would be coming back to work. Perez replied that he would be returning to work then his doctor released him. Kanniard then informed Perez that Whitmoyer and McNair were upset that Perez has not returned to work. Perez answered that he can't be concerned if they were upset or not because he was following his doctor's orders.

50 <sup>4</sup> The record contains no evidence whether or not Kanniard ever made such a recommendation to Respondent.

My findings, detailed above, concerning the status of Kanniard is based on a compilation of credited portions of the testimony of Perez, Fego, Valentin, Amato, Cole, Ball, Kanniard and Rittreiser. While much of these findings are not disputed, there are some inconsistencies between the testimony of the employees and Kanniard in a few areas. To the extent that the record reveals such discrepancies, I credit the testimony of the employees. I found the employees' testimony in general to be consistent and corroborative and believable. I was not overly impressed with Kanniard's credibility, and as will be detailed below concerning his alleged statements to employees with respect to the union and possible retaliation against employees, I credit the employees' testimony over Kanniard's unconvincing denials. Similarly here, where his testimony conflicts with that of employees concerning Kanniard's status, I credit the employees.

For example, although Kanniard unequivocally denied that he shared an office with McNair and/or Whitmoyer and Rittreiser or that he had his own desk in that office, this testimony was contradicted not only by the mutually corroborative testimony of several employees,<sup>5</sup> but by the testimony of Respondent's witness, Rittreiser, who admitted that Kanniard, while serving as a trainer, had his own desk in the same office as McNair.

I have also considered the fact, as argued by Respondent, that there was some inconsistency between Perez's testimony on direct examination and on rebuttal concerning whether the issue of light duty was specifically brought up during his conversation with Kanniard in April of 2010 when Kanniard asked Perez when he would be returning to work. Nonetheless, I credit Perez's updated version of the conversation, as I have detailed above. I find it likely that the confusion about whether light duty was brought up during the conversation was due to the fact that Whitmoyer and Perez had differed over the definition of light duty offered to Perez previously by Whitmoyer and that Kanniard had informed Perez that Whitmoyer was upset that Perez had not returned to work earlier. I credit Perez over Kanniard's testimony that he never called Perez to ask him to return to work, but rather that Perez had called Kanniard to ask about light duty. I also note in this regard that Whitmoyer was not called as a witness to corroborate Kanniard's testimony in this regard nor to refute Perez's testimony that Whitmoyer had offered him light duty.

#### IV. The Union Campaign and Respondent's Reaction

Richard Fego was employed by Respondent since October of 2008 as a second pressman. He was part of a "press crew," which at Respondent consisted of one first or lead pressman, two second pressmen, a roll tender and one or two stackers.

In August of 2009, Fego as well as other members of Fego's crew discussed their dissatisfaction with various working conditions at Respondent, including extremely hot temperatures, lack of air conditioning, failure to provide employees lunch breaks and that Respondent put employees at risk by allowing chemical containers to remain open and rags soaked with chemicals to remain out. Fego and other employees also complained to their supervisors about these conditions. One of Fego's co-employees on his crew was the other second pressman, Kevin Cole. During one of their conversations about their dissatisfaction with these working conditions, Cole asked Fego if there was anything the employees could do to improve their working conditions. Fego, who had been a union member at a previous job, replied that employees should try to form a union. Cole responded "Yeah, let's call the union."

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<sup>5</sup> Perez, Fego, Cole and Valentin.

However, Fego, who was a relatively new employee, was not sure if Cole was serious or not, so he did not make any attempt to contact a union.

5 About a week later, Cole asked Fego again about calling in a union. Fego, at that point, said that he would make a few calls.

10 In September of 2009, Fego telephoned Mike Doklia, an organizer for Local 1, whom Fego had known when Fego was a member of that union at a prior job. In fact, Fego still had Doklia's card. Fego informed Doklia that some employees of Respondent were interested in organizing a union. Doklia met with Fego outside Respondent's premises and gave Fego union literature to distribute to employees. Doklia also began handing out union literature himself to employees in the driveway of Respondent's premises.

15 Thereafter, Fego would pass out union literature to employees as well as inform them of upcoming union meetings. Fego was Doklia's primary contact at Respondent's facility as the campaign progressed.

20 The first meeting held by Doklia and employees of Respondent was on October 20, 2009 at a pizza restaurant near Respondent's facility. Present were Doklia, another union representative, Fego and employee Pedro Puntiel. Doklia explained the process of unionization and that it would be necessary for employees to sign authorization cards. After questions were asked by Puntiel and answered by Doklia, the employees were asked if they were interested in signing a union card. They both agreed, and both Puntiel and Fego signed cards at that time. Thereafter, Puntiel became another of the Union's contacts at Respondent's facility.

25 After this meeting, Fego informed Cole that Doklia had told him and Puntiel that the Union needed to start obtaining signed authorization cards from employees. Fego added that Doklia had advised that the Union needed to obtain signatures from 70% of the employees. Cole told Fego that he was interested in getting involved and wanted to sign a card. Fego, therefore, set up a meeting with Doklia on November 4, 2009. The meeting was supposed to take place at the same pizza restaurant where Doklia had met with Fego and Puntiel in October, but the restaurant was closed. As a result, Fego, Cole and Doklia met in the parking lot of the pizzeria. Cole asked some questions of Doklia, which were answered, and he gave Cole an authorization card to sign. Cole signed it and returned it to Doklia. At that time, Doklia gave Cole and Fego blank cards to distribute to other employees and union literature to give out as well.

40 Thereafter, over the next several months, Fego and Cole would talk to their fellow employees about the Union, attempt to get signed authorization cards for the Union, and/or distribute literature to employees. Fego would pass out union literature to employees before work, after work or, at times, during work. He admitted that he would try to hand out literature in a way that supervisors could not observe what he was doing. While Fego did discuss signing cards with co-employees, he did not distribute any cards to employees.

45 Cole, on the other hand, both distributed and obtained signed authorization cards from some employees. The record does not reflect, which or how many signed cards Cole obtained nor the dates that he did so. Nor does the record contain any direct evidence that any supervisor observed or was present when he obtained these cards from employees.

50 During November and December of 2009, Doklia held several union meetings with employees of Respondent at various locations, including the Tick-Tock Diner and Legends Diner in Clifton, New Jersey and the Red Robin Restaurant, also in Clifton, New Jersey.



In mid-November, Doklia met at the Tick-Tock Diner with Fego, Cole, Puntiel and about seven to ten other employees. At that meeting, the employees asked questions, Doklia answered the questions, explained the unionization process and the necessity for obtaining signed authorization cards from employees. Doklia gave out cards to the employees, and all of the employees present, who had not previously signed union cards, signed cards at that meeting.<sup>6</sup>

The day after this meeting at the Tick-Tock Diner, second shift supervisor Brad Fredericks approached Fego as Fego was walking off the floor. Fredericks asked “How the union meeting went at the Tick-Tock?” Fego ignored the question and walked away.<sup>7</sup>

A few minutes later, Fredericks approached Cole and asked him, “How was the union meeting at the Tick-Tock Diner last night?” Cole responded “I don’t know what you are talking about.” Fredericks retorted “Oh, look. It’s on your face.” Cole answered “I don’t know what you mean.” Fredericks made no further comments, and the conversation ended.

The Union also conducted meetings in early December at the Tick-Tock Diner, Legends Diner and Red Robin. Henry Ball was employed by Respondent as a stacker on February 24, 2008. After seven months, he was promoted to a roll tender position. Kevin Cole informed Ball that employees were interested in bringing in a union to Respondent, and Ball responded that he liked the idea of having a union to protect the employees. Thereafter, Ball attended several union meetings after being informed about these meetings by Cole. At a meeting at the Tick-Tock Diner on December 9, 2009, Ball signed an authorization card for the Union.

Robert Mattei was first employed by Respondent in February of 2008 as a lead pressman. He carpooled to work with Cole and attended several of the union meetings in December of 2009 and thereafter in 2010. Mattei signed an authorization card at a meeting at the Tick-Tock Diner on December 10.

On the morning after the December 10, 2009 meeting, Fredericks approached a group of employees, including Mattei, Cole, Ball, Norm Sanchez and Al Kowalen. Fredericks asked the group of employees, “How did the meeting at the Tick-Tock Diner go?” No one responded to Fredericks’s inquiry.

Joseph Wallace began his employment with Respondent on January 26, 2009 as a second pressman. Wallace, previous to his employment with Respondent, had over 30 years experience in the printing industry, including serving as a first pressman, supervisor and manager. Wallace’s position immediately prior to becoming employed by Respondent was at Vanguard Media LLC, where he was employed as a manager until late-2008 when the company moved upstate and laid off Wallace and other employees. He was interviewed by Whitmoyer before being hired by Respondent, wherein Wallace informed Whitmoyer of his experience, including his managerial experience at Vanguard Media. Wallace worked on the third shift, usually 7:00 pm to 7:00 am.

Wallace was first approached about joining the Union in August or September by Pedro Puntiel. Puntiel asked Wallace what he thought about unions. Wallace asked which one. Puntiel answered Local One. After further discussion between Puntiel and Wallace about unions and

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<sup>6</sup> As noted above, Cole, Fego and Puntiel had already signed union cards prior to this meeting.

<sup>7</sup> Fredericks was, as noted, the second shift supervisor. Fego worked the first shift.

unionization, Wallace opined that he thought it would be a better idea if the employees try to talk to management directly.

During September of 2009, Wallace had several discussions with a number of his co-workers, including Richard Fego, Craig Amato, Mike Gogates, Hector Perez, Henry Ball and Rodney Carter about various working conditions that they were unhappy about, including safety problems, heat concerns and management issues. During these discussions, several of the above named employees talked about organizing a union to resolve these problems. Wallace and Carter argued to try to talk to management about these and other concerns that the employees might have and see if they could come to some type of an agreement without involving a union just yet. Accordingly, Carter and Wallace met with their fellow employees, received suggestions from them dealing with their concerns and developed a powerpoint presentation to present to Respondent.

Wallace subsequently contacted both Brent Woodman and Susan Cohen and asked to meet with management to discuss issues of concern to employees in order to avoid the union coming in to Respondent's facility. Wallace received approval from Woodman to have the meeting as he suggested.

Wallace sent an email to Woodman on October 16, 2009 confirming the meeting, which reads as follows:

Brent,

I spoke to Sue Cohen today by her invitation and I am looking forward to this meeting. I also spoke to some people on the day shift and I am pretty sure I have been able to stave off a pro union vote. I have asked that the people concerned give me the opportunity to talk to you and Dennis and other concerned parties and if I cannot come to some kind of resolution which I am certain we can involving the issues I have given you and Keith and [K]en and everyone that would sit still long enough to listen. I feel that we can resolve these problems and go forward so that the company continues to grow and the workers are happy in terms of wages and work environment and everyone makes money. I hope to hear from you and or Dennis soon. I seem to be on the same page as most of the supervisors from what I have been able to surmise from our discussions. I look forward to our meeting and hope your little girl is OK.

Wallace

Woodman sent an email to Forchic, c.c. to Hager, also dated October 17, 2009, relating to Wallace's email and the meeting.

It reads as follows:

I've already spoken with Jim about the correspondence below. I will tell you now Mr. Wallace is attempting to posture himself. Jim and I have a handle on this, but we would like to conference with you on Monday so we can all share perspectives and assure we are speaking with one voice. Please let me know what a good time for you and I will send out a planner.

The meeting initially to be held with Woodman, Hager, Wallace and Carter was scheduled for October 21, 2009 at 6:00 am. It was subsequently rescheduled for October 28,

2009.

The meeting was held, but Carter could not make it, so Wallace attended without Carter. Cohen was at Respondent's Voorhees plant at the time and observed the meeting via video conference.

In preparation for the meeting, Wallace prepared a four-page document, entitled "AFL Presentation: Where Are We Now. Where Do We Want To Be. How Do We Get There."

The document mentions various suggestions for improvements in scheduling, supervisor miscues, efficiencies in operations, compensation improvements and development of focus teams for areas of concern to analyze problems and develop action plans to improve efficiencies, team work and attitude.

Wallace presented the document to Hager and Woodman and informed them that he and several other employees had discussed the problems in the shop, that morale was low and that he was presenting on behalf of employees some possible solutions to these problems.

Wallace also informed Hager and Woodman that there had been discussion among the employees about brining in a union, but that he felt that the union was not the way to go and that meetings could, in effect, stop the union. Wallace also told Hager and Woodman that he wanted to be a liaison between Respondent and the employees. Hager "emphatically" told Wallace that Respondent did not want that at all, but that if any employee had an issue, they should feel free to come and talk to Respondent.

However, Hager and Woodman did discuss the issues and suggestions made by Wallace during the meeting and informed him that the suggestions made would be looked into and considered.

Hager also told Wallace that Respondent was aware that the Union was organizing at Respondent's Secaucus facility and that it agreed with Wallace that the Union was not the way to go.

After the meeting, Hager sent an email to Cohen and Woodman summarizing his description of the meeting. Cohen, in turn, sent an email detailing her observations. The email exchange is described below:

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- Overall meeting went well. Joe presented his views in a professional and non-confrontational manner. Joe sees this as an opportunity to advance himself or increase his power within the company. At this point I feel he thinks the union is not the way to go but I think he would move in whatever direction that he feels would benefit him. He is a pretty smart guy and he is trying to keep his options open.
- The primary focus from his perspective seemed to be about compensation. He offered many ideas; Incentives, weekend differential, bonus for production, pay for promotions etc. We offered that we have been working on a lot of this for some time and introduced him to the Training Program. We also explained that the way to look at compensation is that everyone needs to know that we expect someone to demonstrate the ability to perform in a new role when given the

chance. The compensation will come when people demonstrate what they can do.

- We did a good job stressing the fact that we did not expect Joe to become a representative of everyone on the floor and if they had any issue we asked that he encourage them to come see us. When Brent stressed this he said he had gotten feedback that Brent was one of the people that would listen to their issues. I may be reading into this but I got the impression that the men might have an issue with approaching Keith on issues. This was not said specifically but we should monitor this. I think it is important that Brent be more visible now than ever and make sure he is selling our message and getting a good feel for the mood on the floor.
- We did discuss the Union issue briefly when Joe brought it up. He said he felt that the union was not the way to go and I told him that we agreed with that. He said that he felt if the union were to get in here it would probably put us out of business in a couple of years. He thought they were a long way from getting the required cards for a vote. He said that he has a problem helping to pay a union reps six figure salary with his hard work. I told him that if a union were to get here we couldn't even have these types of conversations anymore. I would be stuck dealing with only the shop steward. He is very well versed on the workings of a union. Again I want to take him at his word but we need to manage this cautiously.
- We need to identify who the Jimmy is that Joe referred to. It sounded like he had an issue that may have contributed to our current situation.
- I was surprised that Joe's stated that some of the employees were not encouraged by Dennis' letter to the employees. He stated that the people had interpreted one of Dennis' town hall meeting to mean that when the new 4-high towers were put in and we put work on them they would get their 5% back. Now in recent meetings they interpreted that we have to get another press up to get their 5% back. Joe's interpretation is they feel that the target keeps moving and they were disappointed to know that they would only be potentially getting half of the money back. Again this is Joe's interpretation. We need to get other people's feedback on the floor to confirm or deny his interpretation.

Next Step:

I think we need to identify some issues that we can address and get them done. We do not need to announce what we are doing but we should get some of it done. My suggestions are below:

- Newsletter -get a newsletter out in November as a follow-up to Dennis' letter that went home last week
- Forklift Training -Identify all the operators that need training and get an outside vendor in to conduct forklift certification. Eventually we should have an internal trainer but for now we need to get everyone certified. Define our policy regarding the use of the forklift.
- Identify some HR policies and start to communicate them to the floor. Some moral issues can occur when people don't clearly know what is expected of them and everyone doesn't feel they are being treated equally.
- Complete the open pressroom training sheets and meet with the appropriate operators. This has been in the works for months and we should get the operators changes through. Identify a few new operators to get into the program.

Sit with them and review what the program, skill set sheets etc .. Begin to meet with new trainees monthly.

- I really don't think it would be a bad idea to start to put together some process improvement teams to help address some of the pressroom issues. The important thing would be that Management identify what the group will work on prior to meeting. We should have a defined charter going into the meeting. This can't turn into a gripe session but should be a structured six sigma process. One suggestion would be to pull a small team together to address the PM issue we are faced with. I would suggest Keith, a supervisor, Brent (facilitator), and one or two operators from the pressroom. These should be people that are carefully selected so that we can insure the success of the initial efforts. The important thing is these need to be structured meetings and follow-up needs to occur between meetings. With how we were advised from Ian regarding meeting with people I would suggest we get the sign-off of Dennis prior to doing anything here.

- Please reply with your comments so we can get an update out to the leadership team.  
Thanks,  
Jim

Jim, you summarized the meeting well. I agree that Joe is keeping all his options open, and though he says that the union is not the way to go, he does seem[sic] to want to get something out of this for himself, and he likes to be the role of spokesperson and leader. Another next step would be to increase communications on our current training program. When I'm in Secaucus this week Roxanne and I will post the 2 or 3 Finishing employees who recently completed one of the programs on the bulletin board, and post the press folks once we've reviewed the materials.

Susan

Subsequent to the meeting, Hager testified that he raised several of Wallace's suggestions with Forchic and recommended that they be implemented. However, according to Hager, Forchic rejected all of the recommendations. Hager added that he instructed Woodman to notify Wallace of the decision made by Respondent not to implement any of Wallace's proposals, but Hager did not know if Woodman did as instructed.

Wallace, on the other hand, testified that he over the next several weeks made a number of requests from Woodman as to what was happening with the presentation made by Wallace. Woodman, similarly on each occasion, replied that Respondent was still looking into things and that it was going to make changes.

Finally, Wallace, in early December, concluded that Respondent was not going to implement any of the suggestions that he made on behalf of himself and other employees, so he decided to support the union organizing effort. He first contacted Puntiel, who had initially approached Wallace about supporting the Union. Puntiel gave Wallace Doklia's number. Wallace called Doklia and met with him to discuss the Union. They talked at length about what the Union could do for the employees, and what the steps would be and how to go about doing it. On December 10, as noted above, Wallace signed an authorization card for the Union at a meeting at the Tick-Tock Diner along with several other employees, including Mattei.

From the time that he started working for Respondent, Wallace's consistent practice had

been to arrive at work approximately a half-hour before his 7:00 pm start time and would converse with his fellow employees, even with such employees, who were still working on the prior shift. He would discuss various matters with such employees and never been instructed by anyone from management not to engage in such discussions or that this conduct was disruptive of work. As detailed above, Wallace began discussing with his fellow employees their complaints about working conditions as well as the possibility of union representation in September and October of 2009. At that point, as also noted above, Wallace indicated to employees that he opposed unionization and urged instead presenting employees' concerns to management and volunteered to be the spokesman in that regard.

Some of these discussions by Wallace with employees did occur while some of the employees were still on the clock. However, according to Wallace, the employees with whom he spoke were not busy at the time, such as the employees were merely waiting for plates for a job. About two weeks after his late October meeting with Hager and Woodman, Whitmoyer asked Wallace to come into his office. Whitmoyer instructed Wallace that Respondent did not want him on the floor talking to employees, who were working before his shift started, because it was disruptive of their work. Wallace replied that he had been doing this (speaking to employees, who were working) since he (Wallace) started. Wallace asked why all of a sudden is there an interest now. Wallace then inquired if it was because of the Union and added "I'm not the organizer here."<sup>8</sup>

Whitmoyer replied that he didn't say that Wallace was the organizer, but that he wanted Wallace to stay off the floor before Wallace's shift started, and that the instruction had nothing to do with the Union.

In this regard, Wallace testified, without contradiction, that he noticed other employees coming in early and speaking to employees on other shifts, who were still working, who were not talked to about such conduct as far as he was aware.

After he signed his card, Wallace began to approach employees and urging them to support the Union. Most of these conversations occurred with employees outside of work or while employees were outside on a cigarette break or at lunch, or while they were leaving or coming into work.

Occasionally, Wallace would speak to employees about joining the Union subsequent to December of 2009 while these employees were at work. However, he did so only when these employees were not actually engaged in doing anything, such as when they were waiting for a plate. According to Wallace, these types of discussions, after being told by Whitmoyer not to go on the floor before the shift started, would occur rarely, about once or twice a week. Wallace further testified that when he had these union discussions with employees, post-Whitmoyer's admonition, he would always get permission from various other supervisors, such as Deska, Fredericks, Whitmoyer, McNair or Valentine to go out on the floor and speak to employees prior to the start of his shift.

As noted above, immediately after the union meetings at the Tick-Tock Diner in November and December of 2009, supervisor Fredericks questioned employees about the union meetings at the diner. Several employees became upset about these inquiries and were

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<sup>8</sup> As noted above, while there had been union organizing at the facility, Wallace had not been in favor of it at that point and had, in fact, urged employees to discuss their concerns directly with management with Wallace as a spokesman.

very disturbed as to how management became aware that the Union was having meetings at the Tick-Tock Diner and that it apparently knew which employees had attended. Cole called Doklia and informed him about Fredericks' inquiries about and knowledge of the meetings at the Tick-Tock Diner. Doklia instructed Cole to "lay low" with respect to organizing because he did not want to see anyone lose their jobs. Additionally, other employees called Doklia and informed him that they thought management had had gotten wind that a union organizing campaign had gotten under way and they were "spooked."

Doklia decided not to have any more meetings at the Tick-Tock Diner after these incidents. Doklia set up a meeting at Union headquarters on December 22, 2009. A number of employees were present. Doklia and several employees expressed concerns about the fact that Fredericks had asked employees about the union meetings and knew the location of the meetings. Doklia then suggested that the employees "lay low" for a while, particularly, since the holidays were coming up and that the Union would resume organizing when the employees "feel comfortable" after the first of the year.

Respondent admits that it learned of the Union's organizing campaign on October 1, 2009 when its Vice-President Brent Woodman received a phone call from Mike McNamara, a supervisor in the finishing department. McNamara informed Woodman that he (McNamara) had observed two individuals standing off the property at the driveway entrance handing out literature to employees leaving and entering. McNamara also reported to Woodman that a union flyer had been left on his vehicle in the parking lot. While McNamara did not keep the flyer, he described it orally to Woodman, who believed it was the same flyer that the Union had distributed in 2008.<sup>9</sup>

Woodman also received a call from an employee on the same day, who informed him that an individual had offered him a union handout when he arrived at work and that he refused to accept it. Woodman pulled from his file the union handout that Respondent had found in 2008, which he concluded based on his discussion with McNamara, was the identical flyer that was found on McNamara's car in 2009.

Woodman then made several calls to various others of Respondent's officials, including Hager, Forchic and Cohen, and reported the above events. Woodman then sent an email to these officials as well as to Respondent's attorney at the time, recapping the events of that day and reflecting that management officials had decided to seek guidance from its attorney.

On October 14, 2009, employee Harry Pagliaro found an unsigned and unidentified document taped to one of Respondent's presses. The document, which is handwritten, reads as follows:

UNION NOW

WANT WHAT YOUR[sic] OWED!!!

Pagliaro removed the document and brought it to Woodman. Woodman sent an email to Hager, Forchic and Cohen attaching a copy of the document, explaining the circumstances. The email's subject was characterized by Woodman as "union activity note left on press."

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<sup>9</sup> The Union had made some unsuccessful attempts to organize at Respondent's Secaucus facility in 2008 and had distributed some literature at that time.

Upon learning of the union campaign through the union literature found by employees and disclosed to Woodman, as detailed above, Hager discussed the issue with Forchic. Forchic informed Woodman that he preferred not to have a union at the facility and instructed Hager to contact Respondent's labor attorneys and obtain advice from them.

As a result of that advice, Cohen consulted with Respondent's labor attorney and received a presentation to be used to train supervisors on what they could or could not do during a union campaign. Cohen familiarized herself with the materials sent to her, asked questions of the attorney and then proceeded to conduct two to three training sessions with all of Respondent's supervisors at its Secaucus facility. These training sessions took place sometime in late October of 2009. Cohen along with Roxanne Demas, Respondent's human resources coordinator at Secaucus, coordinated the training. The testimony of Cohen and Rittereiser established that the supervisors were informed basically of "do's and don'ts" of what supervisors can and cannot say or do during a union campaign, but with no specifics other than a clear admonition that supervisors were not permitted to surveil employees or engage in union activities, such as attending union meetings or passing out or receiving union literature. Rittereiser also testified that the supervisors were informed during these sessions that employees were not allowed to distribute literature or "bother" employees with union discussions while they were working, but that these activities were allowed during breaks on the employees' own time. They were told that union literature could not be distributed during work time on work premises.

During the months of October through December, Forchic conducted a number of meetings with Respondent's employees at the Secaucus facility, during which the Union was discussed. The meetings were conducted with different employees and supervisors from each shift. Hager was present at only one of these meetings. Kanniard was present at several of the meetings since he often worked on two shifts. When Forchic called the meetings, he requested that all of Respondent's employees and supervisors at the time attend the meetings.

The record is not at all clear as to at precisely which meeting, Forchic made the comments, described below, concerning the Union, but I find that the following comments were made by Forchic or Kanniard at one or more of these meetings.

One of the issues that motivated at least some of the employees to decide to support the Union was that employees were angry that Respondent had cut the wages of all its employees by 5% sometime in 2008. The wage cut also affected employees at Respondent's Voorhees plant as well.<sup>10</sup>

Forchic discussed the economic problems that existed that had affected Respondent's business and that it need to get more sales. Forchic made reference to the 5% wage reduction in 2008 that had been motivated by the economic difficulties faced by Respondent. He acknowledged that he was aware that employees were upset about the wage reduction and also acknowledged that Respondent was aware that some of the employees were seeking union representation. Forchic stated that in his opinion he did not feel that the Union was the right thing for the employees or the company.

Forchic added that unions cannot guarantee employees a wage increase and can only guarantee that you'll have to pay union dues. Forchic emphasized that employees would not get

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<sup>10</sup> Indeed, Respondent had reduced the pay of management officials by 10% at that time due to economic problems.



back the 5% pay reduction any faster with a union or without a union because Respondent just didn't have the money. Forchic reminded employees that he himself had also suffered a wage cut and then added that Respondent intended to return to the employees 2.5% of the 5% reduction in wages by provided a 2.5% increase in January.<sup>11</sup>

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Forchic also informed the employees that they need to understand that if the Union comes, there would no longer be an "open door policy" that the employees have now as in the "town hall" meetings that he was then conducting. If the Union comes, management would be forced to go through the Union. Forchic also told employees that if they had a problem they could come to speak to him.

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Forchic also stated at more than one of these meetings that the Union was not good for the employees and all they do is take employees' money to pay the salaries of union officials. Forchic added that he would not bargain with a union and that he would close down the shop rather than let a union come in.

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Forchic added that if the Union comes in, there was the possibility of strikes, and, if so, "nothing works out for either side."

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At one of the meetings held by Forchic in December of 2009 with the first shift employees, Forchic stated that people were coming up to him and saying that they were being harassed into signing union cards, that the Union was bad and they were a business.

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At some point during the meeting, Forchic asked Kanniard to come to the front of the meeting. Forchic said to the employees that this is as you all know Ken Kanniard and that Ken is going to say a few words about his opinion on the Union.

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Kanniard then came to the front of the meeting and spoke to the employees. Kanniard informed the employees that he had experience in prior jobs with unions and all that unions do is take your money and do not do anything for the employees. Kanniard added that all the Union is going to do is to come in and "shut the doors," and as a result employees lost jobs. At that point, Forchic interrupted Kanniard and stated "I can't say that. I won't say that."

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As set forth above, subsequent to the union meetings at the Tick-Tock Diner, Fredericks questioned employees about their attendance at the union meetings, indicating that he was aware that employees had met at that diner the night before. Employees became upset about the fact that Fredericks, in particular, and management, in general, had become aware of where and who had attended union meetings. Several employees, including Cole, complained to Doklia about this development and, according to Doklia, were "spooked." Therefore, he called a meeting at the Union's office in late December of 2009 to discuss this and other issues regarding the union campaign. At this meeting, employees expressed their concerns that management had become aware of the location of the union meetings based on questioning from supervisors, and they were concerned how management had found out. Various options were suggested, such as calling a meeting for the Tick-Tock Diner but then meeting someplace else. Doklia rejected that option and indicated that there would be no more meetings at the Tick-Tock Diner. He also informed employees that the holidays were coming up and suggested that "everybody lay back a little bit, and we'll see how we proceed from there." No more meetings were scheduled for the Tick-Tock Diner, thereafter, or indeed, any other union meetings for

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<sup>11</sup> In fact, in January of 2010, Respondent's employees, whose pay had been reduced by 5% in 2008, did receive a 2.5% wage increase.

several months.

However, union organizing inside and outside the shop continued in January and February of 2010 by Cole, Wallace and Fego, among others, by discussing the Union and attempting to persuade employees to sign authorization cards and to support the Union. Although no full fledged union meetings were held during this period, at times, one or two employees, particularly, Fego and Cole, would meet with Doklia to discuss the progress of the union campaign.

Additionally, Doklia would continue to appear at the facility to distribute literature continuously during the months of January and February of 2010.

As I have also detailed above, Wallace, in November of 2009, was instructed by Whitmoyer not to be on the floor talking to employees before his shift started because it was disruptive of the work of these employees. As I also found above, this conversation occurred *before* Wallace signed his card and *before* he began to solicit other employees to support the Union, but *after* union organizing had started *after* Wallace discussed common complaints regarding working conditions with employees and *after* Wallace had discussed the Union with employees, albeit attempting to persuade employees to hold off supporting the Union and instead support his acting as spokesperson for employees in dealing with management.

As I also have found above, notwithstanding the November admonition from Whitmoyer, Wallace continued to solicit employees to support the Union while they were at work and while he was waiting for his shift to start. Wallace asserted that he did so only when these employees were not actually waiting for a plate. These kinds of discussions were rare, about once or twice a week.

In 2010, Wallace continued to solicit employees to join and support the Union. Some of the discussions were off-premise and some were at the facility when the employees were on breaks. Occasionally, in December of 2009, about once or twice a week, Wallace would come in early, prior to the start of his 3:00 pm shift and talk to employees still on the clock, working on the earlier shift, about supporting the Union.

On January 16, 2010, Fredericks pulled Wallace aside and told him that he needs to stop walking around and talking to people. Fredericks added, "They're watching you. They think that you're the organizer." Wallace responded to that that he was the organizer and added that he had told several people that already. This conversation was essentially confirmed in an email from Fredericks to Valentine at 1:18 am, wherein Fredericks also reported to Valentine a conversation between Fredericks and Whitmoyer, reflecting that both Fredericks and Whitmoyer believed that Wallace was not being truthful in his (Wallace's) assertion that he is not a union supporter.

This email was forwarded by Valentine to Forchic, Hager and Cohen at 11:34 am. The email is set forth below.

Mike,

I had a conversation with Wallace tonight and he told me he has no interest in the union at all. He thinks that he is being targeted as an organizer and in fact he does not want the union. I spoke to Keith tonight about it and he seems to think that Joe is not being true full [sic]. I have to agree with him. I told Joe that he needs to stop talking to fellow workers about the union and start focusing on his

job. I will keep you updated if anything new arises.

Brad

5 Eight minutes after Valentine forwarded Fredericks' email to Valentine, at 11:42 am, Valentine sent another email to Forchic, Hager and Cohen, relating a conversation between Valentine and Whitmoyer concerning Wallace's conduct in talking to employees on the floor.

The email reads as follows:

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Dennis,

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Keith called me last evening right after I got to the hotel. Joe Wallace came in early and started to go from guy to guy. Keith told him to get off the floor and wait in the lunchroom until his shift started. Wallace then tried to tell Keith we [sic] wasn't for the union. Keith told him he did[sic] care one way or the other but he was tired of Wallace disrupted the crews. Keith also told him if kept this disruption up, we would write him up. Wallace waited in the lunchroom.

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Mike

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The record is unclear as to precisely when this incident referred to in the email between Whitmoyer and Wallace occurred. Wallace gave no testimony concerning a January discussion with Whitmoyer concerning the issue, and it may be that this email refers to the November incident, detailed above, wherein Whitmoyer instructed Wallace not to go on the floor and speak to employees before their shift. However, it appears most likely to me that it refers to an additional, though similar, incident in January of 2010, wherein again Whitmoyer warned Wallace not to disrupt the crews by speaking to employees. I find it unlikely that Whitmoyer would wait until January of 2010 to report an incident to Valentine that occurred in November of 2009. Further, the email states that Keith (Whitmoyer) called Valentine last evening to report that Wallace was talking to employees prior to their shift ending. This also suggests, and I find, that the email refers to an incident in January of 2010, wherein once again Whitmoyer criticized Wallace for talking to employees before their shift ends. Wallace continued to inform Whitmoyer that he was not a union supporter and in this instance, Whitmoyer told Wallace that if he kept the "disruption" up (i.e. talking to employees), he (Whitmoyer) would write Wallace up. I also note in this regard that my finding as to the date of this incident is consistent with the email from Fredericks to Valentine, set forth above, also on January 16, 2010, wherein Fredericks reported that he had spoken to Whitmoyer about Wallace's protestations to management that he (Wallace) did not want a union and that both he (Fredericks) and Whitmoyer did not think that Wallace was being truthful in denying being interested in the Union.

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About a week after the January 16 incidents and emails, Wallace was approached by supervisor Ward Deska. Deska said to Wallace, "Watch your ass. They're watching you. You need to watch out what you say to people."

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In late February or early March, Valentine summoned Wallace into his office. Valentine informed Wallace that an employee had complained to him (Valentine) that Wallace was intimidating them into joining a union and that Valentine wanted it stopped. Wallace asked Valentine who had made such an accusation, but Valentine refused to tell Wallace who had allegedly done so. Valentine explained that he would not tell Wallace who had made the complaint to him about Wallace because the employee involved was afraid of reprisals. Wallace replied that he had not intimidated anyone, but had simply presented the pros and cons of union

membership and informed them to contact Doklia if they were interested and that if they did so, they would be welcomed with open arms. Valentine then said that he would appreciate it if Wallace “backed off a little.” Wallace replied, “Okay, you’re the boss. I’ll do what you tell me to do.”

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In November of 2009, Kanniard asked Perez what his position was on the Union. Perez replied that he actually was currently in a union. In late January of 2010, Kanniard spoke to Perez and told him that AFL had been aware that there “was union activity going in the building” and that Respondent had pictures of individuals gathering and meeting with union officials at the Tick-Tock and Legends Diners. Kanniard added that it was only a matter of time before Respondent “got rid of them all.” Kanniard specifically mentioned the name of Wallace, Cole and Mattei and informed Perez that these individuals “were in for a rude awakening – that they would be the first to go.”

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On or about January 19, 2010, as supervisor Dan Johnson was speaking to Henry Ball about a job that he was going to be running, Johnson stated “By the way, you need to watch yourself.” Ball asked what did Johnson mean. Johnson replied that management knew about the Union and that Ball needed to watch himself and work a little harder because someone was “ratting” to the bosses and providing names of union supporters. Ball asked what does this have to do with him. Johnson answered that Ricky Lawrence, a co-worker, had been terminated that day and that he (Lawrence) had given names to management of employees, who were union supporters. Johnson told Ball that his (Ball’s) name was mentioned by Lawrence as a union supporter along with other employees, including Lawrence Roessner, Bob Mattei and Kevin Cole. Johnson concluded the conversation by urging Ball to “keep his nose clean, do what you need to do.”<sup>12</sup>

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Also, in mid- to end of January of 2010, Johnson spoke with Fego while they were smoking a cigarette on break. Johnson informed Fego that the company knew that employees were trying to organize for the Union and that the company knew that Kevin Cole and Fego were among the employees organizing for the Union, and he warned Fego to “be careful.”<sup>13</sup>

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On January 18, 2010, Forchic sent an email to Cohen with copies to Hager, Valentine and Verna Williams, Forchic’s executive assistant. The email refers to a meeting on that day to discuss what was going to be needed to “respond to the union effort.” It further states that Respondent is putting together literature that it is gathering regarding industry layoffs, cut-backs and closures and attached several articles in that regard, which detailed closing of plants that will be part of the discussion. The email chain included an email from Forchic to Hager, Cohen and Valentine, dated January 8, which referenced prior articles on closings of L.A. Times and ConVEO plants, wherein Forchic instructed his subordinates that “we need to find out if the LA Times and two ConVEO plants were union plants.”

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Sometime in February, as a group of employees, including Cole and Fego, were coming

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<sup>12</sup> Ball, as noted, signed his union authorization card in December of 2009. Lawrence was present at that meeting and signed a card at that time. Both Mattei and Cole also signed cards at meetings at the Tick-Tock Diner. Roessner, the other employee mentioned by Johnson as having been identified by Lawrence as a union supporter, was not present at the Tick-Tock Diner, according to Ball. Further, Ball provided no testimony, nor does the record reflect, any evidence as to whether Roessner even signed a union card or otherwise supported the Union.

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<sup>13</sup> Johnson was also a personal friend of Fego, and they socialized outside of work. Johnson left Respondent’s employ for another job shortly after this conversation.

into work, Kanniard asked Cole, “When the Union gets in, are you going to be the shop delegate or shop steward?” Cole laughed and made no response to Kanniard’s inquiry.

At some point in March of 2010, Kanniard informed Perez that Respondent was weighing several options in case the Union gained any ground in organizing the shop. Kanniard stated that one option being considered was to close the Secaucus plant and move all the work to the Voorhees plant. Kanniard added that someone had come in to take measurements of the presses in preparation for moving them. Kanniard further informed Perez that the second option under consideration was to bus the Voorhees workers into Secaucus and leave them do the work. Kanniard added that in his opinion, he did not think that the Voorhees workers would mind because they were working 320-hour weeks at the Voorhees facility.

The union organizing campaign continued during the months of January, February and March of 2010. It consisted of employees, such as Fego, Perez, Cole and Wallace, discussing the union campaign and attempting to persuade other employees to sign cards in support of the Union. These discussions took place at work while employees were on breaks and outside the facility. The Union also conducted a few meetings during these months, but primarily Doklia would meet with one or two employees outside the facility to discuss the Union and the campaign.

Doklia would also appear at the facility during these months to distribute literature to employees.

In approximately December of 2009, Doklia distributed union t-shirts to employees, and subsequently, employees began to wear them into work. Sometime in February or March, Valentine issues a memo to employees on behalf of Respondent, stating that only shirts with AFL logos were to be worn by employees while working. The memo also stated that no shorts or sandals would be permitted to be worn by employees while working. After that memo was issued, some employees, such as Cole, Perez or Fego, would wear the union t-shirts in to the shop but change into their work clothes, where they would either take the union shirt off or cover it up before starting to work on the presses.

Craig Amato was first employed by Respondent as a second pressman on the third shift. On April 1, 2009, his direct supervisor was Ward Deska. In January of 2010, Kevin Cole approached Amato and asked Amato what he thought about the Union. At that time, Amato informed Cole that he wasn’t sure about the Union. Cole informed Amato that if he had any questions about the Union, he should either talk to him (Cole) or Rich Fego. In March, Amato decided that he wanted to meet with the Union to get some questions answered. He asked Fego to set up a meeting with the Union for that purpose.

A meeting was subsequently arranged by Fego and Doklia to meet on March 19 at the Legends Diner. In addition to Doklia, employee Matt Deska was also present.<sup>14</sup> At the meeting, after Amato’s questions were answered, Amato signed an authorization card for the Union, dated March 19, 2010. Matt Deska also signed a union authorization card at the same meeting at the Legends Diner. Shortly thereafter, Perez and Kanniard were smoking a cigarette in front of Respondent’s facility when Amato and Fego passed by them and entered the building. Kanniard informed Perez that Amato had attended a union meeting at the Legends Diner and that Amato had signed a union card. He also told Perez that someone was providing the company with this information, but he did not immediately tell Perez who it was.

<sup>14</sup> Matt Deska was also the son of Amato’s supervisor, Ward Deska.

After Amato signed his card, he spoke to a number of employees on the pressroom floor about the Union and tried to convince them to sign cards as well. Some of the employees, whom Amato spoke to in this regard, were Perez, Chris Aviles, John Bayard, Louis Zayas, Al Kowalen, Joe Fix, and Robert Boast. These conversations between Amato and co-workers occurred usually before his shift started, and he would tell employees about the benefits of the Union, suggested that they sign cards and/or meet with Doklia in order to discuss the Union and sign cards. Amato arranged for a meeting between Chris Aviles and Wes -- with Doklia, and both of these employees met with Doklia and Amato and signed union cards.

On March 1, Kevin Cole was sending a text on his cell phone at work while the press was running. According to Cole's testimony, which is not disputed by any of Respondent's witnesses, it is a common practice for both employees and supervisors to use their cell phones at work, even while the press is running. Cole had done so in the past and was seen by various supervisors, including Valentine, Johnson, Metz and Fredericks, and was never informed that this conduct (using a cell phone while at work) was forbidden or against any company policy. Indeed, frequently, supervisors and employees text each other using their cell phone on business related matters.

However, on this day in March, Valentine approached Cole and said to him, "This is fucking bullshit. You have a fucking job to do." At that point, Cole said nothing, and Valentine grabbed a newspaper from the machine and walked away. Cole followed Valentine and confronted him about his comment. Cole said, "I don't disrespect you, so don't disrespect me." Valentine did not reply.

Later on, in the same day, after returning from lunch, Cole saw the "three amigos" (Kanniard, Valentine and McNair) standing together. Valentine looked at Cole and shook his head in disgust. Cole then asked Valentine why he had shook his head at Cole. Valentine gave no reason but informed Cole that he wanted to see Cole in his office after Cole's run was over.

Before Cole's run was over, Valentine sent supervisor Doug Metz to take Cole's spot as second pressman and to tell Cole to come into Valentine's office. Cole complied, and in Valentine's office, McNair was also present. Cole asked why McNair was in the room. Valentine replied that McNair was a manager and had insight into the situation. Cole asked if he could have someone present to be with him. Valentine then made a phone call and informed Cole that he could not have anyone in the room during the meeting.

Valentine told Cole that he must pay attention to the presses when a job is running and not be doing other things.

Cole replied that everyone hated working for the "three amigos," that they were ruining the company, nobody was getting paid what they deserved, conditions weren't fair and everybody, including Cole, was unhappy working there and that he (Valentine) was the big problem. Valentine stated that Cole was lazy and that no one wanted to work with him. Cole replied for Valentine go get someone, who doesn't want to work with him because he knew that he was friendly with everyone and all his co-workers liked him.

Valentine told Cole that if he didn't like working for the company, he could "walk out the door." Valentine also called Cole a chicken, and Cole said that he would not walk out the door.

Later in the day, Cole requested a copy of Respondent's employee handbook from Roxanne. Roxanne did not give him a copy because she informed Cole that he had already had

a copy and was reading it. According to Cole, in fact, he did not have a copy and stated that he would not have asked for a copy if he already had one.

On March 3, Valentine prepared a document entitled “Performance Note: Kevin Cole,” which was placed in Cole’s personnel file. The document reads as follows:

Performance Note: Kevin Cole  
Date: 3/3/10

On 3/1/10 I noticed that Kevin was texting on his phone, with his back to the presses during a press run, “South Bay”. I approached him and spoke to him about this and he became insubordinate. I brought him into my office to continue the conversation.

He stated that he dislikes working here; that everyone dislikes it here, even the supervisors; and that Mike is creating a rift between the supervisors and the employees.

I told that he must pay attention to the presses when a job is running and not doing other things. He was informed that this meeting constitutes as verbal warning.

Later in the day, he requested a copy of the Employee Handbook from HR and Roxanne was about to give him a copy and saw that he already had one and reading it.

Mike Valentine  
Plant Manager

Cole never saw or received a copy of this document. Although it states that Cole was informed at the meeting that the meeting constitutes a “verbal warning,” Cole unequivocally denied that he was so informed.<sup>15</sup>

On April 2, Respondent laid off Cole, Mattei and Wallace.<sup>16</sup> Amato, after being informed of the layoff, called Doklia and asked to meet with Doklia. A meeting was held on April 17, attended by Amato, Fego and Ball.

Also, sometime in April, Ball and McNair were discussing the fact that Ball’s grandparents were from Tennessee. McNair was from Kentucky, which is a neighboring state. During the course of that conversation, McNair said to Ball, “You know there’s no union in Tennessee.” McNair then asked Ball, “How do you feel about a union being at AFL?” Ball responded, “I’m for the union at AFL.”

On April 19, Respondent terminated Whitmoyer from his position as pressroom manager. After he was terminated, Whitmoyer shook hands with the employees under him, and they wished each other good luck. When he got to Fego, Whitmoyer added, “Good luck with your union.”

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<sup>15</sup> Valentine did not testify. Hager admitted that he became aware of the incident and the document that appeared in Cole’s file.

<sup>16</sup> The facts concerning this layoff are detailed more fully below.

Sometime in early May, Kanniard left an article on union pensions on Fego's work area. Fego wrote "thanks" on the article and put it back on Kanniard's toolbox. The next day, Kanniard approached Fego and said, "Oh, you know, I was only joking around." Fego answered, "It's  
 5 okay, you know. I'm not upset or anything. I just wanted to tell you thank you." Kanniard responded, "We were only having fun. We were joking." Kanniard then asked if he could talk to Fego outside. They walked outside had a cigarette, and Kanniard asked, "Can I talk to you?" Fego said, "Sure." Kanniard told Fego that "the company knows that you're trying to organize the place. They think that you're number one on the list." Fego responded, "Don't take this stuff  
 10 personal because, you know, we have to do what we have to do and you guys do your job."

Also, in the month of May, Amato was speaking with employees John Bayard and Wes -- in the pressroom. Kanniard approached the employees and said to Amato that he (Amato) "was going to be the next union representative." Amato responded that he didn't know what  
 15 Kanniard was talking about and that he did not know about a union. Kanniard made no reply and walked away.

Also in May, while Amato and Bayard were talking, Fredericks approached the employees. Fredericks asked them, "When is the next union meeting?" Amato responded that he didn't know anything about a union meeting and that he was not affiliated with a union.  
 20

On May 23, Doklia held a meeting with fourteen employees at the union office. It was decided that the Union was going to file a petition with the Labor Board to obtain an election. The employees present took an oath of brotherhood and signed a "bargaining committee letter for their protection." Doklia instructed its union attorney to send a copy of the letter, which was  
 25 dated May 22, to Respondent.<sup>17</sup>

On May 25, 2010, the Union filed a representation petition in Case No. 22-RC-13119.

On June 11, 2010, Valentine sent an email to Cohen and Hager describing his  
 30 conversation with Fego on June 10, relating to the Union and the NLRB representation hearing, scheduled for Monday, June 14. The email reads:

Around 8:00am on June 10, I gave the employees on Carl Chances crew (Folder #2) information concerning the union representation petition. Rich Fego took the memo from me, looked at it for a couple seconds and went to hand it back to me. He said while smiling "there is no sense in me looking at this". I responded  
 35 "Come on Rich, just keep an open mind about this". Rich then asked me if I was going to the NLRB hearing on Monday. I responded "What hearing?" Rich said laughingly "Yeah right". He told me he thought he would be there, but he said the union officials would let him know later that day if they wanted him there or not. I told Rich, "You already know my feelings about this". "I've told you before, if you want the union here, I understand". "I don't agree with it and I think you guys are  
 40

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<sup>17</sup> General Counsel conceded that it had no evidence that Respondent ever received the letter that was prepared at the meeting that named members of the "bargaining committee." Indeed, the letter was not introduced into the record, which also does not reflect which names were on the letter. Doklia did testify that the Union's primary guy in setting up meetings with employees and relaying information to employees was Fego and the point man for him was Cole. Doklia added that Ball, Perez, Puntiel and Gustavo Marin were also all employees used  
 50 by him to "put word out in the shop."



making a mistake, however the last thing I want to see happen is to have a wedge driven between you and me or a wedge between me and the employees". "This would be the last thing I would want to see happen as it will only hurt both of us". Rich responded "That is not going to happen". "Our beef is not with you Mike, but with AFL." "You have treated us fair and you have always been straight with us, so we see no reason why we (the union) can't work together with you." I asked Rich why he felt they needed a union and he said "Because we (the employees) need certain things to survive." I asked him like what. His response was "More money, a pension and job security." I said "You really think the union is going to get you all of that?" He said "Yes". I said "Rich think about what you are saying. Don't you think if I (AFL) had the money, I would give you a raise." He responded "Yes I believe you would, but we know you have bosses, as we do." "If they won't give you the money, we understand you have to do what you are told to do by your bosses." I said "Rich, if we had the money, I would get you a raise but the company is in poor shape right now." Rich said "We will see Mike, we will see." After that he walked away. The conversation was not at all confrontational.

The NLRB hearing was held as scheduled on June 14. Fego was subpoenaed to testify by the Union at the hearing. He appeared at the hearing, but the record does not disclose whether or not he testified.

Shortly before June 15, Kanniard sent a text message to Perez. The message was that there were to be "fireworks going off in the building." Perez responded by asking what did Kanniard mean? Kanniard texted back, "You will see."

On June 16, Respondent laid off 16 pressroom employees, including Amato, Ball and Fego.<sup>18</sup>

An election was conducted on August 4. The Union won the election and was subsequently certified as the bargaining representative of the pressroom employees at Secaucus. As of the close of the trial in the instant case, the parties were still engaged in bargaining for a new contract.

My findings above in this section is based on a compilation of the credited portions of the testimony of Fego, Cole, Mattei, Wallace, Ball, Amato, Perez, Valentin, Doklia, Hager, Cohen and Kanniard, plus my review of documentary evidence, such as emails as set forth. Much of these findings are based on undenied or unrefuted testimony of the employee witnesses called by General Counsel. Thus, Forchic, Valentine, Fredericks, Whitmoyer, Metz, Johnson, Deska and McNair did not testify, so the mutually corroborative testimony of various employees concerning their conversation or comments about the Union with employees is credited.<sup>19</sup>

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<sup>18</sup> The facts concerning this layoff will also be detailed below in a separate section.

<sup>19</sup> It is true that Valentine, Forchic, Whitmoyer, Metz, Johnson, Deska and McNair were no longer employed as supervisors by Respondent at the time of trial. However, that did not preclude Respondent from calling any or all of them as witnesses to refute the testimony of the employees. Indeed, Cohen was also no longer employed by Respondent at the time of the trial, but Respondent did call her as a witness to testify about the layoff process. I also note that Fredericks, although no longer a supervisor of Respondent, was not terminated by Respondent, but merely demoted to first pressman and was employed by Respondent at the time of the trial.

Further, the testimony of several of these witnesses is mutually corroborative and similar in nature to conversations testified to by employees with the same or different alleged supervisors or agents.

5 The only refutation of the employees' testimony in certain respects came from Kanniard's testimony. Kanniard denied making any of the comments attributed to him by the numerous employees as I have detailed above. I was not impressed with Kanniard's self-serving and unpersuasive denials nor with his testimony in general. I find that he was so intent on establishing his alleged lack of supervisory and agency status that he was even contradicted  
10 by his Respondent's own witness, Rittereiser, with respect to whether Kanniard shared an office and had his own desk in an office with Rittereiser and McNair.

Accordingly, based on the above, as well as comparative demeanor factors, I do not credit Kanniard's denials and have credited the employees' versions of Kanniard's comments  
15 and actions as I have detailed above.

Kanniard also furnished some testimony contradictory to some employees as to what was said by Forchic at the meetings that Forchic held in 2009 and the circumstances of Kanniard's involvement in the meeting as well as what Kanniard himself said. To the extent that  
20 Kanniard's testimony varies from or contradicts the testimony of General Counsel's witnesses, I credit the employees' testimony, which I have detailed above. I also note that while Kanniard furnished some generalized testimony about what Forchic said at the meetings, including that the employees did not need a union, Kanniard did not deny the testimony of the employee witnesses that Forchic, at more than one meeting, threatened to close the shop rather than let  
25 the Union come in.<sup>20</sup>

#### V. The Layoffs of Cole, Mattei and Wallace

On April 2, 2010, Cole, Mattei and Wallace were notified that they were laid off. Wallace  
30 was called into a meeting with Rittereiser, Gamarra and Valentine on that date. Rittereiser informed Wallace that there was a reduction in Respondent's workload resulting in cutbacks and that he was being laid off. Wallace asked if it had anything to do with the Union. Rittereiser responded no, the two things are not related. After the meeting ended, Wallace pulled Gamarra aside and asked, "Tell me the truth. Is this about the Union?" Gamarra replied, "No."

35 All three employees received identical letters, dated April 5, referring to the April 2 layoffs and explaining to the employees the compensation benefit and insurance options. The letters are as follows:

40 \_\_\_\_\_  
<sup>20</sup> Hager was Respondent's only other witness to testify about Forchic's comments to employees about the Union. According to Hager, he was present at only one of the several meetings that Forchic conducted with employees and discussed the Union. Hager testified that he recalled Forchic informing employees that he believed that the Union was not the right thing  
45 for the employees or the company and that the Union could not guarantee employees any more money and all they could do is take money out of your pockets. Hager also confirmed testimony of employees that Forchic promised to return 2.5% of the wages to employees that had been previously reduced. Hager did testify that he did not hear Forchic threaten employees that he would shut down the plant if the Union came in. However, I note that Hager asserted that he  
50 was present at only one of the Forchic meetings. In any event, to the extent Hager's testimony can be construed as a denial that Forchic made such comments, I do not credit such denials.

Re: Separation from Employment

Dear Bob,

5           As we discussed, A.F.L. Quality NY LLC, Inc. (d/b/a AFL Web Printing)  
("AFL") has found it necessary to reduce its staff due to the overall unfavorable  
economic environment in our industry. As a result of this decision, AFL has  
identified a number of positions which are being eliminated, and unfortunately  
10       this included you. Thus, your employment with AFL terminated, Friday, April 2,  
2010. You will be paid through and including April 2, 2010. You will receive your  
final check on 4/16/2010 which will include your days worked through April 2,  
2010 and any available unused and accrued vacation time, according to the AFL  
Employee Handbook. Direct deposit will stop and your final check will be a "live"  
check, which will be mailed to your home.

15           If you participate in AFL's group medical and/or dental insurance, that  
coverage terminated on April 2, 2010. Information concerning continuation of  
group medical and dental insurance coverage ("COBRA"), if applicable, will be  
mailed to you shortly. Should you have any questions concerning COBRA,  
20       please contact the Plan Administrator at (609) 872-0001.

          Your participation in AFL's group life insurance plan will terminate  
effective April 2, 2010. However, there may be an option for you to convert this  
coverage to an individual policy or replace this coverage with a private plan. If  
25       you are interested in pursuing these options, please contact Fort Dearborn at 1-  
800-348-4512 who will put you in contact with the appropriate person.

          Your participation in AFL's 401(k) plan, if any, will terminate on April 2,  
2010. You can receive information concerning your post-employment options in  
30       connection with your 401(k) account balance, if any, by contacting John Hancock  
directly. Should you have any questions concerning your 401(k) account balance,  
you should contact the Plan Administrator, John Hancock at 1-800-333-0963.

          Under the circumstances, you are eligible for unemployment benefits.  
35       You have received a completed BC-10 form which you should use to apply for  
unemployment compensation benefits.

          We wish you well in any job search that you might undertake.

40       Sincerely,  
Susan Cohen  
Director of Human Resources

cc: Personnel File

45           The Union and/or concerted activities engaged in by Cole, Wallace and Mattei are  
detailed above. Hager, Rittereiser and Cohen all testified that their only knowledge of union  
activity at Respondent's facility came when Respondent became aware of a union pamphlet  
being left on a car in October of 2009. They further testified that they were not aware of whether  
50       any particular employee was a supporter of the Union. Rittereiser also testified that neither  
Fredericks, Johnson, Metz or Deska reported to him that any employees were engaging in any  
sort of union activity. Rittereiser also denied that Deska had ever reported to him that Deska's

son had given Deska (senior) information as to who was trying to organize for the Union.

On the contrary, both Cohen and Hager testified that they believed Wallace was not interested in the Union, and this belief was based on Wallace's own assertions to them. The facts relating to these communications are detailed above, including Wallace's own admissions that he was consistently assuring various management representatives that he was not a union supporter.

Further, while conceding that various emails from several of Respondent's supervisors, which are detailed above, expressed skepticism about Wallace's sincerity in these protestations, Cohen and Hager, nevertheless, insist that they both believed Wallace when he told Respondent's representatives that he was not a union organizer or union supporter.

Hager and Cohen testified that Respondent's financial problems had begun in 2008, resulting in numerous attempts by Respondent to cut costs in various ways, culminating in the April 2 layoffs. As already detailed, Respondent instituted a pay cut in 2008 of 10% for executives and 5% for all other employees at both of Respondent's facilities.

Hager testified that Respondent spent a lot of money to install the new DGM presses in Secaucus in the hopes of attaining new sales revenues since Secaucus is closer to the New York market. However, the economy in general and the printing industry as a whole began a huge downward spiral at about the time the presses became operative in early 2008.

As a result, Respondent's revenues and sales continued to decline, resulting in continued financial losses. In February of 2009, Respondent decided that it needed to further reduce costs and concluded that layoffs would be necessary.

It laid off employees at both Voorhees and Secaucus that included 20 manufacturing employees, seven pressmen from the Voorhees plant and a few finishing employees at the Secaucus facility. The employees laid off in 2009 were selected by using a rankings process developed by Cohen's predecessor as HR director. This process involves utilizing forms filled out by management officials in various categories, ranking employees in numbers from 1-4.<sup>21</sup>

However, Respondent's business continued to decline, and on December 15, 2009, Respondent concluded that further reductions in costs were necessary. According to Hager, he discussed along with Forchic and Mark Henderson, another vice-president, and Bob Bechtel, the CFO, how to make further cuts since it wasn't bringing in enough sales to pay its bills. It was concluded that some layoffs would be necessary. Forchic and Henderson had sales background and were positive that they were going to be able to bring in more work. The possibility of laying off press employees was discussed, but rejected since the group, particularly Hager, felt that if Respondent cut further into its press department, they would not be available if and when Respondent would bring in new business. The group concluded at that time that the skilled employees were harder to replace and that Respondent could do without some administrative sales and administrative personnel, who would be easier to replace. Thus, it was hoped that if business improved, it would have the skilled employees available to run the presses. Thus, Respondent on December 15, 2009 laid off Brent Woodman, its vice-president for manufacturing at its Secaucus facility, and eight administrative and management employees employed at its Voorhees facility.<sup>22</sup>

<sup>21</sup> The categories were technical skills, productivity, reliability and teamwork.

<sup>22</sup> These employees included three customer service and sales representatives, a sales

Continued

According to Hager, at the time that the decision was made to layoff these employees on December 15, 2009, Respondent had become aware of union organizing at Secaucus by virtue of the finding of the union leaflet.<sup>23</sup> However, Hager asserts that the subject of the union organizing did not come up during the above described discussions amongst management officials, wherein it was decided that the layoffs at that time would include only nine managerial and administrative employees.

In late February or early March, a restructuring company (CDG) took over Respondent's operations. Forchic remained as the CEO, but his involvement in running Respondent's operations began to diminish. CDG representatives tasked Hager, Henderson and Bechtel to come up with a plan to reduce costs and get business back on track.

In March of 2010, Respondent lost a significant amount of revenue when its client, Greater Media Partnership, closed. Hager testified that as a result of the loss of this account, a decision was made to layoff three employees, Mattei, Wallace and Cole. At a meeting, which included Cohen, Valentine and Hager, it was decided to use the same ranking system utilized by Respondent in its February 2009 layoff, which was described above. The events of this meeting were confirmed in an email from Cohen to Hager and Valentine, which reads as follows:

As per our meeting today with you and Mike, we will use the ranking system that was used during a prior layoff in Feb '09. As you mentioned, due to the loss of the Greater Media account, which occurs at the end of March, the plan is to reduce the press staff by approximately 3 employees. This determination will be made based on performance and we'll use the same 4 performance criteria on the ranking document. Please send me the ranking spreadsheet and I will populate it with the current employees and forward to Mike V.

Subsequent to that email on March 17, the ranking spreadsheets were prepared by Cohen and forwarded to Valentine. The rankings were prepared by Rittereiser and Whitmoyer. These supervisors were instructed by Hager to prepare their evaluations of the employees on their own and to return them to Respondent's officials. Hager did not know whether or not Rittereiser or Whitmoyer consulted with the direct supervisor of the employees in formulating their rankings. In that regard, Rittereiser testified that he was given the spreadsheet by Valentine and that Valentine instructed him to rank the employees on a scale from zero to five with five being the best and that the evaluations were to be done separately from the rankings being performed by Pressroom Manager Whitmoyer. Rittereiser did not consult with any of the employees' supervisors in preparation for his rankings. Rittereiser also testified that he did not consult the personnel files of any of the employees, except for seven employees, who he had recalled had previously received write-ups.

According, to Rittereiser, the March 2010 rankings was the first time that he had ever been asked to perform rankings on employees or had ever used the ranking system before. Although, as noted above, the testimony of both Cohen and Hager corroborated the fact that the identical system was used in the February 2009 layoff. Rittereiser did not ever recall that there was a layoff in February of 2009. The record establishes that

manager, an HR generalist and three billing and accounting employees.

<sup>23</sup> Indeed, Respondent had conducted its supervisory training and Forchic had conducted his meetings with Secaucus employees when the layoffs were effectuated.

most of the layoffs involved Voorhees employees. Hager did testify that there were a few finishing employees in Secaucus that were laid off in February of 2009, who would presumably have been ranked at that time. Rittereiser was the operations manager in Secaucus and apparently would not have been involved in ranking employees in Voorhees in 2009.

Rittereiser and Whitmoyer prepared their evaluations, submitted them to Valentine, who in turn submitted them to Cohen.<sup>24</sup>

After receiving the evaluations, Hager sent an email to Cohen dated March 24, attaching the evaluations, which he combined into one spreadsheet. The email reads:

Susan,

Attached please find the evaluations that were completed by both Ken and Keith. I combined them into one spreadsheet. Our plan is to reduce one lead operator and two second pressmen. Due to the loss of Greater Media we can no longer justify these positions.

Thanks,  
Jim Hager

The rankings reveal that Mattei, Cole and Wallace had the lowest scores of Respondent's employees, who were ranked.

As noted above, Hager testified that the decision to select Mattei, Wallace and Cole for the April layoff was based solely on the fact that they were the three lowest scoring employees on the ranking scale that Respondent had used in its February 2009 layoffs. Hager was also asked on cross-examination and by the undersigned to provide more specific details about the decision-making process, particularly as to how, why and who decided which employees or classifications would be laid off, the number of employees laid off and why Voorhees employees were not ranked or laid off in April of 2010. As set forth above, the March 17 email from Cohen, summarizing the meeting on that day between Cohen, Hager and Valentine, reflects that Hager stated at the meeting that due to the loss of the Greater Media account, Respondent planned to reduce the staff by "approximately 3 employees."

In Hager's March 24 email to Cohen, wherein he attached the combined spreadsheet, Hager commented, "Our plan is to reduce one lead operator and two second pressmen." Hager was asked on cross-examination about these emails and his statements therein. When asked to describe what he meant by "our plan," he was unable to recall whose "plan" it was, who was involved in formulating the plan or who else other than himself made the decision. Hager did testify that he made the recommendation to layoff the three individuals, which was signed off and approved by Forchic and CDG representatives.

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<sup>24</sup> In Cohen's March 19 email to Valentine, she requested that he forward the rating sheets to Whitmoyer and Rittereiser, have them "do it separately, then forward it to you. You may want to have a meeting once they've finished and go over it together so you can ask questions you may have about their rankings." The record does not reflect whether Valentine had meetings with Rittereiser or Whitmoyer about the ratings as Cohen suggested. Valentine did not testify. While Rittereiser did testify, he did not mention such a discussion with Valentine nor was he asked about it on cross-examination.

Hager furnished more detailed explanations about the decision under questioning by the undersigned. According to Hager, the Greater Media account was a significant client, billing \$3.5 million dollars a year. This account printed three days a week on several presses, which amounted to 40 hours of press time per week. Hager recalled that Respondent was notified in the beginning of March that the job would be ending by the end of the month and that he recommended to Forchic and Henderson that as a result of the loss of this account that Respondent should layoff some employees. Hager further testified that since the loss of the account of 40 hours of work translated to the loss of a press crew a week. A crew, according to Hager, consists of one lead pressman, two second pressmen and a roll tender. Hager then explained that although he recommended that a "crew" be laid off, the number of employees to be laid off somehow got reduced from four to three. Hager could not recall why or how that decision was made, but speculated Respondent did not layoff any roll tenders (part of the crew) because Respondent needed a roll tender somewhere else and/or that someone had left. Thus, according to Hager, Respondent needed that roll tender somewhere else. He could not recall whether any specific roll tender had been initially selected for the layoff or when the decision was made that a roll tender would not be laid off.

Mattei was the lowest ranked first pressman and Cole and Wallace were the lowest ranking second pressmen on Respondent's ranking system. They were not all on the same crew, so Respondent moved around some employees on other crews when the layoffs were effectuated.

Hager also testified that the reason that employees at Voorhees were not ranked by Respondent or considered as part of the layoff pool was that all of the work lost (i.e. the Greater Media account) was performed at the Secaucus facility.

Hager also testified that he had no knowledge of any union activities other than the October 2009 finding of a union leaflet, described above. He further asserted that the subject of union organizing did not come up during the layoff discussions and decisions, in which he was involved.

Additionally, Hager insisted that he had no knowledge of whether Mattei, Cole, Wallace or any particular employee supported the Union or signed a card for the Union. As also noted above, Hager did testify that Wallace was not a union supporter because Wallace had so informed Hager when they met to discuss the proposals that Wallace had made on behalf of himself and other employees as a possible alternative to union representation. Hager continued to insist that he personally believed Wallace when he informed Respondent that he was not a union supporter. Hager continued to so insist, notwithstanding that he was copied on emails from various supervisors, reflecting that although Wallace continually insisted that he was not a union support that the supervisors believed that Wallace was not being truthful in that regard. Indeed, in one of these emails, Fredericks informs Valentine that he (Fredericks) told Wallace to "stop talking to fellow workers about the union and start focusing on his job."

Hager, while conceding that he was copied on these emails and must have read them, testified that he didn't remember seeing them and suggested that he received so many emails every day that he may not even had read these emails at the time.

In this regard, Hager was also asked on cross-examination about his comments in his email to Cohen and Woodman on October 28, 2009, wherein in describing his meeting with Wallace, Hager made some references to the Union. In that email, Hager stated that Wallace stated at the meeting that the Union was not the way to go and that Hager told Wallace that he

agreed with that. Later on in the email, Hager commented that Wallace “is very well versed on the workings of the union” and added in reference to Wallace’s assertion that Wallace was not in favor of the Union, “again, I want to take him at his word but we need to manage this cautiously.” When asked about these comments, Hager did not recall making these assertions to Respondent’s officials. After reading the email, Hager testified that it was an accurate summary of the meeting, but that he did not recall it. Hager was further asked, “It’s your testimony that you did nothing to manage the union issue after October 28, 2009?” Hager responded that he and Respondent had no specific plan and was not sure what he was being asked. General Counsel persisted in questioning that Respondent need to “manage this cautiously,” and Hager finally conceded that “Yeah, because we preferred not to have a union in the company.” Finally, General Counsel again asked did Respondent do anything after 2009 to manage the union issue. Hager answered that Respondent had the “union avoidance training” with its supervisors, as discussed above.

Hager was also asked about another comment in his email to the effect that “we need to identify who Jimmy is that Joe referred to. It sounded like he had an issue that may have contributed to our current situation.” Hager was asked if that reference to “current situation” meant union activities. Hager replied no, that he believed that it had to do with Wallace having concerns about the company and that other employees also had similar concerns as well.

Respondent introduced into the record an email sent by Henderson to Hager and Bechtel, dated March 31, 2010, which is a summary of what was submitted by Henderson on behalf of Respondent’s officials to CDG representatives, setting forth possible solutions to improve costs and increase profitability.

Guys, please review, this is coming from all three of us.

We need to set the expectations of this process, if you agree I would like to get out ASAP changes please send to me.

Barry, per out[sic] conversion[sic] this am on the criticalness and urgency of creating a plan that our short term survival and long term success, we discussed the below and which was ba[sic] yesterday conference call.

The team, Jim Bob and I need to live this for the next two weeks starting today, that this priority to create the plan that will provide the above; we will look at this as lock down of

The possible solutions are as follows: (other ideas can also be considered)

1) Shut down Secaucus and move work to Voorhees

2) Shut down Voorhees and move accounts to Secaucus

3) Reduce inventory to night side and shut down dayside in Secaucus and move dayside in Voorhees

We need to determine the following for options 1, 2, 3 in no particular order.

1) Reduction in human cost / new structure / org chart for all departments

2) Change in accounts / which ones provide the best return in real dollars and on



a def parameters. Profitability, ability to pay, fit our standards.

3) Equipment: changes / cost

5 4) Plant / rent / cost

5) Web standardization

10 6) Ideas for new sales strategy

7) Possible other topics.

15 The goal would be to provide the Data and our business judgement, as much of this is going to be based upon future assumption which we need to be confident that we can execute upon, to CDG and they will create the model/analyses for us to review.

20 Jim, Bob and I have agreed that we will start this process today and allow our team to deal with the day to day.

We will set up a tactical planning area in my office, from time to time we would like to update you on our[sic] progress to ensure that we are heading in the correct direction on that data that you will required[sic] to create the model.

25 If we are all in agreement let's[sic] get going.

30 While this memo was dated March 31, after the decision was made to layoff employees on April 2, it did refer to ongoing discussions amongst management officials concerning various solutions to cut costs and to create a plan for Respondent's "short-term survival and long-term success." Hager was asked about this document, particularly with respect to the discussion among management officials about moving work from Secaucus to Voorhees. According to Hager, among the various options being considered by management was the moving of work from Secaucus to Voorhees as well as moving some work from Voorhees to Secaucus. This process involved a decision to rebalance the work by shifting particular jobs from one facility to another in order to maximize efficiency. For example, in Voorhees, Respondent would have shifts in Voorhees, where there was insufficient work and that a particular press would not be in operation for parts of the shift. Thus, it was decided to shift some work from Secaucus to Voorhees in order to make sure that the Voorhees shifts have sufficient work to fill their shifts. When asked why Respondent decided not to simply layoff employees at Voorhees, he responded that the Voorhees work involved were not full shifts as it would not be feasible to layoff Voorhees employees to resolve that problem. Hager further testified that this "rebalancing" (i.e. transfer of work) started in March and continued through to when the second layoff occurred, as discussed above.

45 In the midst of this "rebalancing" of accounts, which included some transfer of work from Secaucus to Voorhees,<sup>25</sup> the Greater Media account was lost, which led directly to the decision

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50 <sup>25</sup> According to Hager, the "rebalancing" process also included some transfers of work from Voorhees to Secaucus during the period between March and June. For example, Respondent transferred WWD daily newspaper work from Voorhees to Secaucus because Secaucus was closer to the New York market. According to Respondent's email detailing balancing plans, this

Continued

to layoff three employees (Mattei, Wallace and Cole) on April 2. Since this account was performed solely at Secaucus, Hager asserts that it was decided to layoff only Secaucus employees and not to consider including Voorhees employees in the ranking for the April layoff.

5           Rittereiser provided testimony concerning his conduct in preparing the ranking evaluations. Rittereiser was the operations manager at Respondent since October of 2007, with experience in the newspaper industry of over 20 years as roll tender, second pressman, crew chief, supervisor, manager and then to operations manager, his current position. While  
10           Rittereiser was made aware of the union organizing in 2009 based on a union pamphlet having been found at the Secaucus facility and management conducting supervisory training in 2009 on the “do’s and don’ts” on what supervisors can say, he asserts that he had no other knowledge of any union organizing activities at the facility. He also denied that Fredericks, Johnson, Metz, Deska or any other supervisor reported to him that any employees were  
15           engaging in any sort of union activity. Rittereiser explained that he made his ranking based on his observation of the employees’ production and knowledge and how they worked as well as looking at some documentation in employees’ personnel files. In the latter regard, as I detailed above, Rittereiser did not look at the files of all employees, but only of the files of seven employees, who he recalled had received written disciplinary notices.

20           Rittereiser also testified as to why he gave Mattei, Wallace and Cole low rankings in several categories. Mattei received an overall rating (combing scores of four categories) from Rittereiser of 9. This was by far the lowest rating for any of Respondent’s 10 first pressmen.<sup>26</sup> Rittereiser asserts that Mattei had a lot more experience than everybody else and he  
25           (Rittereiser) thought that Mattei would bring a lot more to the table than he did. According to Hager, Mattei was “written up quite a few times for quality issues, didn’t produce what he should have been producing, high waste low meets, things like that, that’s why he was ranked low.”

30           Rittereiser then elaborated on Mattei’s scores in specific categories. In the category of technical skills, Mattei received a 2 while the other employees rated by Rittereiser received 3s or 4s. Rittereiser explained that in his judgement “their technical skills were higher than Bob’s were. I was looking for the best people.”<sup>27</sup> Rittereiser rated Mattei as 2 in productivity, which put him also below nearly everyone else rated by Rittereiser.<sup>28</sup> His explanation for that rating is “the same. Everybody was producing better than Bob.” With respect to the category of teamwork,  
35           Rittereiser gave Mattei a 2 again, which is also less than anyone else rated by Rittereiser in the category, except for Cole, Wallace and Amato, who received 1, 2, and 2, respectively from Rittereiser in this area. Rittereiser explained that score as follows: “As a first operator, he’s directly responsible for what comes off that press. His team wasn’t putting out.”

40           On cross-examination, Rittereiser was asked about his testimony that Mattei was written up a “couple of times.” He was asked what the write-ups were for. He replied that one was for “quality,” but did not recall the specifics nor what the other write-ups were about.

45           was the only account transferred from Voorhees to Secaucus. In contrast 15 accounts were transferred from Secaucus to Voorhees between March and June.

<sup>26</sup> Of the other first pressmen rated by Rittereiser, one received a 12 and the other eight had scores ranging from 14 to 17. The only employees rated by Rittereiser to receive scores under were Wallace and Cole, who received scores, as detailed below of 9 and 8, respectively.

50           <sup>27</sup> Except for Wallace, Cole and Amato, who received 2s, respectively, from Rittereiser in this category.

<sup>28</sup> Wallace and Cole were the only other employees rated 2 in this category.

In this connection, Mattei did receive a written warning, dated February 25, signed by Whitmoyer, which also makes reference to a prior warning issued to Mattei for substandard work. This warning is set forth below.

5 AFL Web  
Regional Print Center

### Written Warning

10 Name and Employee ID: Bob Mattei  
Title: Lead Pressman  
Date of Hire: 1/25/08  
Department: Pressroom  
Supervisor: Keith Whitmoyer  
Time in Position: 2 years

15 Subject: Standards of Performance and/or Conduct  
The following incidents represent substandard performance or conduct. (Attach a separate sheet if necessary for documentation)

20 1. AREA REQUIRING IMPROVEMENT – Be very specific; give examples of substandard performance/conduct; include dates of prior verbal warnings.

25 On 2/9/10 Bob's crew ran Greater Media News Transcript B section, the skid quality was extremely poor. Because of this poor quality of product a lot of the product had to be inserted by hand taking a total of approximately 21 additional man hours which also caused additional delays in production. Skid quality is extremely important and must be controlled by the Lead Pressman, Bob is directly responsible for the quality of product coming from his press and it was beyond substandard. This must improve immediately.

30 2. REQUIRED STANDARDS – Clearly describe to the employee a fully acceptable level of performance or conduct in the area(s) cited above.

35 Bob is responsible for maintaining the quality of work produced on his press, he must produce a quality product capable of being handled without issues in the finishing department or any other department.

40 3. DISCIPLINARY ACTION – State the precise action you will take if substandard performance or conduct continues.

45 This is Bob's second warning for substandard work in the past 6 weeks, substandard work is unacceptable and must stop immediately. This is a written warning to notify Bob that his quality of work cannot continue to be a problem, future problems can lead to further disciplinary action up to and including termination.

### 4. SIGNATURES

50 I discussed the contents of this notice with the employee. I have advised the employee of his/her opportunity to respond either verbally or in writing.

Keith Whitmoyer – 2/25/10

## Supervisor's/Manager's Signature and Date

My supervisor has discussed the above mentioned issues with me. I understand that I am required to sign this form as acknowledgement that these items have been discussed with me. My signature on this form is not necessarily an indication of my agreement with the information presented within this document. Furthermore, I understand that I have the right to provide verbal or written response to the issues outlined in this document. If the terms of this warning are successfully met, consideration will be given to "removal" from this written warning. However, if the problems outlined above are not corrected within \_\_\_\_ day, further disciplinary action as noted in Section 3 will be implemented.

Employee Refuses to Sign – 2/25/10

Employee Signature and Date

Mattei furnished some testimony about this incident. He recalls receiving the write-up, but testifies that in his view it was unjustified because the problems had on the job had begun on the previous shift and that he had enlisted the help of Supervisor Johnson to help rectify the situation. He explained his position in that regard to Valentine after the job ended, who had informed Mattei that the "whole job is terrible." Valentine and Whitmoyer explained to Mattei that as first pressman of the crew, he was in charge and should have stopped the presses rather than continue to run it and resulting in waste. Mattei also denied that he had received any prior warnings as reflected in this warning.<sup>29</sup>

Rittereiser ranked Cole as an 8 overall, which is the lowest ranking that he gave to any of the employees that he evaluated. He gave Cole a 2 on technical skills because he felt that Cole's "quality wasn't up where it should be. The turnaround times on the press very slow; just didn't ever want to reach the next level in my eyes." Rittereiser also ranked Cole as a 2 in productivity because "very low, he in my eyes would do just enough to get by." Rittereiser gave Cole a 1 on teamwork, which is the only score that he gave to any employee in any category. He explained that rating as follows: "His team never performed, which was a direct reflection of that number. His crew never really gave attention to detail, would be all over." Rittereiser also testifies that he was aware that Cole that had insubordination issue with Mike Valentine.

The alleged insubordination involving Valentine refers to an incident that occurred on March 1. This incident is discussed above. Valentine's version is reflected in the performance note that he prepared. As noted above, Rittereiser did review the personnel files of those employees, who received write-ups, including Cole, before preparing his rankings.

Rittereiser rated Wallace a 9 overall and gave him a 2 on technical skills. He explained that this was because "Joe was pretty much everywhere except where he was supposed to be. Joe would wander around the pressroom and not be at this work station and leaving his crew at a disadvantage all the time." Rittereiser further testified that he personally observed Wallace doing this and instructed Whitmoyer to talk to Wallace about his conduct. Rittereiser ranked Wallace as a 2 in productivity. He explained: "Same with productivity. All over the building, if you're not being productive, you are, not only that, you're disrupting other people."

Rittereiser added that the general low ratings that he gave to Wallace in several

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<sup>29</sup> Respondent did not introduce into the record any written prior warning six weeks prior to the 2/25 warning.

categories were based on “my perception of his abilities.”

Finally, Rittreiser testified that he had no knowledge of whether any employees, including Wallace, Mattei and Cole, were union supporters or engaged in any union activities and that no one from Respondent influenced him in any way in his ratings of these employees.

After the layoffs were effectuated, Cole texted Amato to notify him about the layoffs. Amato texted back to Cole that he (Amato) felt that it was unfair that Respondent was laying off more experienced employees while it had “recently” hired some other employees, who had not been laid off. The “recently” hired employees to whom Amato was referring were according to his testimony, Rodney Carter, a first pressman, Gustavo Marin and Robert Chavez, second pressmen, and Leroy Taylor, a roll tender. Amato believed that all of these employees were hired at around the same time, according to his recollection, a few months before the layoffs of Cole, Mattei and Wallace.<sup>30</sup>

Amato conceded that he was not aware if Respondent hired any new employees after the layoff of Wallace, Mattei and Cole. Amato also testified that he was unaware of any company policy that stated that layoffs would be based on seniority.

Finally, Amato testified that sometime between March and June, he noticed that some work was being shifting between Voorhees and Secaucus. Amato testified that he asked his supervisor, Ward Deska, why the work was being shifted to Voorhees. Deska responded that the work is “down at Voorhees,” but did not respond further to Amato’s inquiry.

## VI. The Layoffs of Ball, Amato and Fego

On June 16, Respondent laid off 18 employees at its Secaucus facility, which included two supervisors, Ward Deska and Brad Fredericks. Respondent also laid off three employees from its Voorhees facility on that date in sales, customer service and accounting classifications.

Included in this layoff were Amato, Fego and Ball, who are alleged discriminatees herein. In this regard, General Counsel concedes that this layoff was motivated by economic considerations but asserts that the selection of Ball, Fego and Amato for inclusion was unlawful and was based on their union activities.<sup>31</sup>

The union activities of Fego, Amato and Ball are detailed above in the section detailing with the union campaign and Respondent’s reaction to such a campaign.

Fego was hired by Respondent in October of 2008 as a second pressman. Prior to that, he had 24 years of experience in the printing industry, including serving as a first pressman. He worked on the first shift. Dan Johnson was the first pressman on the crew that Fego was assigned to. Subsequently, Johnson was promoted to supervisor and Carl Chance replaced Johnson as first pressman. Kevin Cole was also on that crew as a second pressman for some

<sup>30</sup> In fact, Carter, Chavez and Taylor were hired by Respondent on June 16, 2009 and Marin was hired on September 6, 2009.

<sup>31</sup> I note that the Union’s charges and amended charges also alleged the Respondent violated the Act by laying off employees, Joseph Fix, Louie Zayas, Fernando Rosado, Chris Aviles, Lawrence Roessner and Hector Perez. General Counsel declined to issue a complaint with respect to the layoffs of these employees.

period of time before Cole was transferred to another crew.<sup>32</sup>

Fego never received any criticism from any supervisor about his performance on the job. On occasion, he was told that the crew, him included, “did a good job.” Fego asked Valentine for a raise. Valentine replied that Fego was a good worker, had good skills and that he (Valentine) has been in business a long time and knew Fego’s experience level is high. However, Valentine stated that there were quite a few guys that he wanted to give raises to, but he just couldn’t give raises to anyone right now because it was just not in the budget.

Henry Ball began his employment with Respondent on February 24, 2008 as a stacker. Seven months later, he was promoted to roll tender. He worked on the morning shift. Ball never received any criticism of his performance from any supervisors. On June 16, Ball reported to work but learned that there was no work. He decided to take one of his vacation days. When he returned home, Ball received a call from Kanniard, Kanniard informed Ball that he was sorry to do this over the phone, but “there was no work here, and we decided to lay you off.”

On the same day, Respondent sent identical letters to Ball as well as to the other employees laid off on that date. The letter reads as follows:

June 16, 2010

Henry Ball  
251 North Street  
Prospect Park, NJ 07508

Dear Henry,

As we discussed, A.F.L. Quality NY LLC, Inc. (d/b/a AFL Web Printing) (“AFL”) has found it necessary to reduce its staff due to the overall economic environment in our industry. As a result of this decision, AFL has identified a number of employees’ whose employment will be terminated today, and unfortunately this includes you. Thus, your employment with AFL will end today, Wednesday, June 16, 2010. You will be paid through and including today, June 16, 2010. A separate check will be issued to include a severance payment equal to (1) weeks of pay at your current wage, and any available unused and accrued vacation time, as per company policy. Both checks will be issued on 6/25/10. These checks will be directly deposited (if you currently have that option) on 6/25/10, and your direct deposit advice will be mailed to your home. All live checks will also be mailed to your home.

If you participate in AFL’s group medical, dental and/or vision insurance, you will be provided coverage through the end of the month, and that coverage will end on June 30, 2010. Information concerning continuation of group medical and dental insurance coverage (“COBRA”), if applicable, will be mailed to you shortly. AFL will also pay half of your July Cobra premium. If you elect to continue your insurance via Cobra, please send your first month’s Cobra bill to Human Resources for the half month reimbursement. Should you have any

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<sup>32</sup> Cole was transferred at some point to the same crew as Mattei because they carpooled to work together. Al Kowalen, another employee was also on that crew and also carpooled with Cole and Mattei to work at Respondent.

questions concerning COBRA, please contact the Plan Administrator at (609) 872-0001.

Your participation in AFL's group life insurance plan will terminate effective June 16, 2010. However, there may be an option for you to convert this coverage to an individual policy or replace this coverage with a private plan. If you are interested in pursuing these options, please contact Fort Dearborn at 1-800-348-4512 who will put you in contact with the appropriate person.

Your participation in AFL's 401(k) plan, if any, will terminate on June 16, 2010. Information concerning your post-employment options in connection with your 401(k) account balance, if any, will be mailed to you shortly. Should you have any questions concerning your 401(k) account balance, if any, you should contact the Plan Administrator, John Hancock at 1-800-333-0963.

Under the circumstances, if you apply for unemployment compensation, you will be eligible for that benefit. We have enclosed a completed BC-10 form which you should use to apply for unemployment compensation benefits. Due to State regulations, however, we will be required to notify the State of your receipt of any severance benefits.

We wish you well in any job search that you might undertake.

Sincerely,  
Susan Cohen  
Director of Human Resources

Enclosures: Form BC-10

cc: Personnel File

Amato was hired as a second pressman by Respondent on April 1, 2009. He worked on the third shift. On March 16, 2010, Whitmoyer gave Amato a verbal warning for working on a crossword puzzle while at work. The warning, which was memorialized in a company document, entitled "Verbal Warning," reads as follows:

AFL Web  
Regional Print Center

#### Verbal Warning

Name and Employee ID: Craig Amato  
Title: Second Pressman  
Date of Hire: 4/1/09  
Department: Pressroom  
Supervisor: Keith Whitmoyer  
Time in Position: 1 year

Subject: Standards of Performance and/or Conduct  
The following incidents represent substandard performance or conduct. (Attach a separate sheet if necessary for documentation)

1. AREA REQUIRING IMPROVEMENT – Be very specific; give examples of

substandard performance/conduct; include dates of prior verbal warnings.

I walked up to F-1 at 11:30, I noticed Craig leaning over the console, I walked over and saw he was working on a crossword puzzle. I asked him, are you actually working on a crossword puzzle, he said yes. I asked him if I was working for you would you want to pay me for working on crossword puzzles? He said no. I said I don't ever want to see him doing this again, understood? He said yes.

2. REQUIRED STANDARDS – Clearly describe to the employee a fully acceptable level of performance or conduct in the area(s) cited above.

Be attentive to his work.

3. DISCIPLINARY ACTION – State the precise action you will take if substandard performance or conduct continues.

Craig needs to be focused on his work, if he continues this type of behavior it will lead to further disciplinary action up to and including termination.

4. SIGNATURES

I discussed the contents of this notice with the employee. I have advised the employee of his/her opportunity to respond either verbally or in writing.

Keith Whitmoyer – 3/16/10  
Supervisor's/Manager's Signature and Date

My supervisor has discussed the above mentioned issues with me. I understand that I am required to sign this form as acknowledgement that these items have been discussed with me. My signature on this form is not necessarily an indication of my agreement with the information presented within this document. Furthermore, I understand that I have the right to provide verbal or written response to the issues outlined in this document. If the terms of this warning are successfully met, consideration will be given to "removal" from this written warning. However, if the problems outlined above are not corrected within \_\_\_\_ day, further disciplinary action as noted in Section 3 will be implemented.

(Verbal)  
Employee Signature and Date

Hager, Cohen and Rittreiser were once again Respondent's principal witnesses in explaining Respondent's decision to layoff Amato, Ball and Fego. Thus, they corroborate each other that Respondent's financial difficulties continued, notwithstanding the layoffs of April 2, including notification in late March or early April that Respondent was going to be losing another large account (CNG), which amounted to approximately 120-150 hours of work per week. At that time, the specific date for this account was uncertain. However, Respondent decided that the loss of this account would require future layoffs and that it would use the same ranking system utilized in the April 2, 2010 layoffs, whenever the next round of layoffs would be effectuated. This decision was confirmed in the email from Cohen to Valentine and Hager. The email reads as follows:

Mike,



As per our conversation last week in Secaucus and this morning, due to the loss of the CNG account in the near future, we will use the ranking system we recently used, for any staff reductions that are being planned at this time. The determination will again be made based on performance and we'll use the same 4 performance criteria on the ranking document. You already have the press ranking document. Let me know if there is anything else you need.

Susan

During the month of April, Hager testified that he and Henderson had continued discussions with CDG representatives, including Michael Healy, concerning Respondent's plans to reduce costs and increase efficiencies. As a result of that discussion, according to Hager, it was decided to layoff 9 management sales and general administrative employees. This list encompassed 8 employees of Respondent at Voorhees, which included its chief financial officer, Robert Bechtel, and one employee at Secaucus, Keith Whitmoyer, pressroom manager. Respondent did not use the ranking system used by it in its February 2009 layoffs, even though Cohen's April 12 memo seemed to reflect that future layoffs would be using that ranking process and forms.

Thereafter, discussions continued between Hager, Henderson and the various representative of CDG, such as Healy, Barry Shea and John Strek, in regard to progress to increase profitability and efficiencies, including staff reductions. These plans also included a continuation of the "rebalancing" of accounts between Voorhees and Secaucus that had begun in March, prior to the April layoff.

According to Hager, Respondent was trying to maximize that amount of hours that were unmanned in the Voorhees facility. Respondent did not feel that it would be getting more work in Voorhees, so it needed to fill in more hours on unused presses in Voorhees. When asked why Respondent didn't decided to layoff Voorhees press employees, Hager responded that Voorhees did not have full shifts, so he need to balance out the work because it is inefficient to shut a press down because it could have some work. Thus, Hager explained that he tried to make sure that each of the crews was filled up more efficiently.

Various emails were sent between Respondent's officials in early May, detailing the progress of the "rebalancing" of accounts as well as the staff reduction decisions. They revealed that a number of accounts were transferred from Secaucus and one large account, WWD, was transferred from Voorhees to Secaucus because the client preferred to have the job run closer to the New York area.

In a May 11 email from Hager to Healy, Shea and Strek, it states as follows: "CNG notified and agreed to final print day of 6/4. Susan beginning preliminary work with Secaucus management to start grading direct labor employees to finalize reduction list."

Thus, at that point, Respondent was aware that the final print week for the CNG account would be 6/4 and then decided that there would be layoffs primarily at Secaucus, starting on June 14. As noted above, the layoffs were due for the most part to the loss of the CNG account, which was performed in Secaucus and which amounted to the loss of approximately three crews of work per week.

The ranking forms were distributed by Cohen to be completed by Rittereiser and McNair, who had replaced Whitmoyer as pressroom manager, who was laid off on April 19 and who had

ranked the employees for the April layoff. On May 14 at 5:25 p.m., Rittreiser sent in his rankings of the press employees to Valentine. These rankings were eventually combined with McNair's rankings.

5 Rittreiser also testified concerning his rankings in May. He asserted that he rated Fego as a 3 in technical skills. As to productivity, Rittreiser again gave Fego a 3 "based on my observation of his productivity." Rittreiser explained that he ranked Fego as a 2 in reliability because Respondent had been needing employees to work overtime, and Fego was turning down the opportunity to work overtime. Rittreiser explained his decision to give Fego a 2 in  
10 teamwork as follows: "About the same, but leaving the team at a disadvantage."

Rittreiser also testified about his May rankings for Amato. Rittreiser gave Amato a 2 for teamwork skills because "Craig's skills weren't where they should have been." In comparison to Fego, who was rated a 3 on technical skills, Rittreiser testified that Fego "was able to  
15 troubleshoot things a little bit better."

Rittreiser ranked Amato as a 2 in teamwork because "Craig had a tendency to not pay attention to detail. He would turn his back to the press, be on his phone. I think he was written up for instead of watching his ink and motor, doing crossword puzzles. That impacted on his  
20 score."

Rittreiser gave Ball a 3 in all four categories because, in his view, based on his evaluation of Ball, he was "average."

25 Rittreiser testified further that he was not aware of whether Amato, Ball or Fego engaged in any union activities and that his rankings of them and nothing to do with any union organizing activity.

After Rittreiser submitted his rating to Valentine, Valentine combined the ratings  
30 submitted by McNair into a single document, which he used to formulate his recommendations as to which employees to layoff as of June 14.

On May 16, 2010 at 2:14 p.m., Valentine sent an email to Hager and Cohen attaching the combine rankings of the press employees, plus his recommendations as to how to  
35 implement the layoffs. It reads:

Jim,

40 Here is the ranking of the press employees. Due to the decrease of business, here is what I propose:

1. John Contreni, John Bayard and Jeff Willison go from Lead Pressmen positions down to 2nd Pressmen. Their pay would drop down to the same rate as Mike Golgates, which is around \$23.40 per hour. Susan can  
45 verify. Whenever these three pressmen would do Lead Pressmen duties, they would be compensated at \$25.00 per hour.
2. Norma Sanchez would be transferred from the Press Department into the Finishing Department. Her pay rate would stay the same.
3. Layoffs of Second Pressman – Hector Perez, Richard Fego, Eddie  
50 Bacon, Joseph Fix, Larry Roessner, Nate Thomas and Craig Amato.
4. Layoffs of Roll Tenders – Henry Ball and Louis Zayas.
5. Layoff of Press Helper – Christopher Aviles.

## 6. Layoffs of Press Supervisors – Ward Deska and Brad Fredericks.

Mike

Subsequent to the receipt of this document, Hager, Cohen and Valentine discussed Valentine's recommendations in this regard. In these discussions, Valentine recommended to Hager and Cohen that Respondent not layoff any first pressmen at that time because they were highly skilled and knowledgeable. Thus, although John Contreni, John Bayard and Jeff Willison were the three lowest scoring first pressmen in the combined rankings, Valentine instead recommended that they be demoted to second pressmen with a consequent reduction in pay and that instead six second pressmen be laid off.<sup>33</sup>

Hager testified that he agreed with Valentine's recommendation that it was a wise idea to keep skilled first pressmen and instead demote the three lowest scoring first pressmen and layoff second pressmen in their place. However, Hager did not agree with Valentine's recommendation to reduce the pay of the three demoted employees because he felt that new work would be coming in, and they would be promoted back to first pressmen. Thus, he concluded that there should be no pay reduction, despite the demotion for the employees. Aside from that change, Valentine's recommendations were accepted.

Additionally, Rittereiser was asked to rank the employees in the finishing department. He did so using the same ranking system utilized with the other employees. Rittereiser ranked 25 employees (machine operators and line feeders) and 3 supervisors. He sent his rankings to Valentine on May 14 at 5:25 p.m.

On May 26, Valentine sent an email to Hager and Cohen, attaching these rankings and recommending that due to the decrease in business, he recommends that machine operator, Nancy Aziani, and line feeders, Jorge Dominguez and Lupe Rosas be laid off.<sup>34</sup>

Rittereiser was also asked to, and did, rank Respondent's four employees in the pre-press department using the same system. On Monday, May 17, based on these rankings, Valentine sent an email to Hager and Cohen, attaching Rittereiser's rankings for these employees, and proposed that Respondent layoff Jennifer LaManna, the lowest ranking of the four employees in this department "due to the decrease in our business."

The recommendations of Valentine were approved by Hager, and LaManna, Dominguez and Rosas were also included in the June 16 layoff.

Subsequently, Valentine recommended to Hager that due to additional downturn in business that Jim Billerman, another machine operator from the finishing department, be laid off and that Respondent transfer Ava Setano from Respondent's Voorhees facility to Secaucus because she was familiar with the WWD job, which was being transferred to Secaucus. Valentine then recommended that as a result of the transfer that Scott Harris, another operator, be laid off. These recommendations were also approved by Hager, resulting in an email from Cohen to Valentine and Hager, dated May 24. The email also states, "This is what the list is like as today. We still have time to make changes. So we can discuss further." According to Hager, there were no further changes made, and the decision was made as of that day, May 24, to be

<sup>33</sup> Hector Perez, Richard Fego, Eddie Bacon, Joseph Fix, Larry Roessner, Nate Thomas and Craig Amato.

<sup>34</sup> These recommendations were based on the scores of these employees on the rankings.

effectuated on June 4.

Respondent also decided in May to layoff three employees in Voorhees as of June 16.<sup>35</sup>

5 Finally, Respondent accepted Valentine's recommendations made on May 17 that Mark Roy be laid off as a supervisor. However, Roy resigned before being notified of his layoff. On that same date, May 17, Valentine recommended that Respondent stop using a number of its temporary employees in the maintenance and finishing department. This recommendation was also approved, and Respondent stopped using temporary employees between June 4 and June 11.<sup>36</sup>

10 Thus, according to Hager, the decision was made to layoff employees on June 14, and the list of employees to be laid off in Secaucus was detailed in Cohen's May 24 email. As noted, although the email states, "We still have time to make changes," no such changes were made, according to Hager's recollection.

15 The petition was filed, as detailed above, on May 25 and received by Respondent on May 26. The petition for the unit consisted of "all pre-press and press lithographic employees"; excluding, clericals, guards and supervisors. As was also noted above, a representation hearing was held during, which Respondent took the position that first pressmen were supervisors. The director found that these employees were not supervisors, and the election was directed in a unit, which included these employees.

20 On June 16, the layoffs were effectuated. The list of employees laid off consisted of 18 employees from Secaucus<sup>37</sup> and 3 from Voorhees.<sup>38</sup>

25 The final list is not precisely consistent with the May 24 list, which, according to Hager's testimony, was not changed, as far as he recalled. Thus, Scott Harris and Brenda Deliz, machine operators, were on the May 24 list, but not on the final layoff list submitted by Respondent of employees laid off on June 14. No explanation was offered by Respondent for this discrepancy, but it may simply have been an oversight or that Harris and Deliz resigned between May 24 and June 14, so they were, therefore, no included in the final list of employees laid off.

30 Respondent recalled Amato on January 13, 2011 and Fego on January 30, 2011. Subsequently, Amato was promoted to first pressman.

## VII. The July Conversation between Kanniard and Valentin

35 As related above, an election was directed by the Region and was held on August 4.

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<sup>35</sup> Special project coordinator Lenore O'Brien, customer service representative Misty Kohlmeyer and account executive Robert Laney.

<sup>36</sup> These temporary employees were never employed by Respondent but, instead, employed by an outside contractor.

<sup>37</sup> Perez, Fego, Bacon, Fix, Roessner, Thomas and Amato, second pressmen; Ball, Zayas, Rosado, roll tenders; Aviles, press helper; LaManna, pre-press digital operator; Aziani and Billerman, machine operators; Dominguez and Rosas, line feeders; and Deska and Fredericks, press supervisors.

<sup>38</sup> Laney, account executive; Kohlmeyer, customer service representative; and O'Brien, special projects coordinator.

Edwin Valentin was employed by Respondent as a roll tender on the second shift. Valentin was eventually terminated by Respondent on September 7, 2010, allegedly for “insubordination.”<sup>39</sup>

Valentin sign a card for the Union, attended meetings at the Tick-Tock Diner and spoke to other employees at work about supporting the Union. Valentin was not laid off in either the April or June layoffs, discussed above.<sup>40</sup> In early July, Valentin and Kanniard were discussing the upcoming election and the Union. Kanniard told Valentin that it was not a smart idea to vote the Union in and if the Union was brought in, the place will shut its doors. Kanniard also informed Valentin that if the Union came in and there was a strike or a lockout, he had a lot of friends from upstate New York, who were formerly employed by DGM that installed the presses that are out of work, who the company could bring into to install the presses.

Kanniard also told Valentin that if the Union was voted in next month, “We got our eyes on another plant, and we’ll move the presses.” Kanniard added that the employees were stupid for trying to unionize the place because the investors, who took over AFL, don’t have any money to negotiate with the employees. Kanniard said that the reason for the layoffs was that the investors wanted a certain percentage of payroll cut out. Kanniard also informed Valentin that he has a union card and belongs to a union in New York. Valentin asked how Kanniard can talk bad about the Union when he belongs to a union himself. Kanniard replied that he uses the union card whenever he goes back home and he uses the union card to make more money.

Later on, in July, during a different conversation, Valentin asked Kanniard whether Ward Deska was one of the snitches giving management information about employee union activities. Kanniard replied that Deska had given the company information about union meetings and that at one of the union meetings at the Tick-Tock Diner, supervisors were hiding in a truck or a SUV outside the diner and watching everybody going in and out of the diner.<sup>41</sup> According to Valentin,

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<sup>39</sup> The Charging Party filed a second amended charge against Respondent, adding an allegation that Respondent violated the Act by laying off Valentin on September 7 in retaliation for his engaging in protected concerted activities. The Region declined to issue a complaint as to that allegation in the charge.

<sup>40</sup> In the rankings for the April layoffs, Valentin received a combined score of 15, tied as the highest score of all the roll tenders. No roll tenders were laid off at that time. As noted the three pressmen laid off at the time, Wallace, Mattei and Cole, had scores of 9, 9, and 8, respectively. For the June layoffs, Valentin received a combined ranking of 13. The three roll tenders, who were laid off at the time, Ball, Zayas and Rosado, received scores of 12. Seven second pressmen were laid off. Their scores ranged from 10 (Amato and Fix) to 13 (Perez). Aviles, a press helper, received a score of 10 and was laid off as well. Machine operators, Billerman and Aziani, received scores of 14 and 12, respectively and were also laid off. Similarly, line feeders Dominguez and Rosas and pre-press digital operator LaManna with scores of 12, 12 and 13, respectively were also laid off. Finally, Respondent also laid off supervisors Deska and Fredericks on June 16, who received scores of 15 (lower than scores of 16 for Kanniard, pressroom trainer and 16 for Metz listed as press supervisor).

<sup>41</sup> Valentin was one of the employees, who attended the meetings at the Tick-Tock Diner. As noted above, he was not laid off. Additionally, according to Valentin, roll tender Luis Hullacoponna was at the meetings and signed a union card. He also was not laid off. Hullacoponna’s combined scores on his rankings were 15 for the April layoff and 14 for the June layoff, which rankings were submitted on May 12. Zayas was also present at the Tick-Tock Diner and signed a card. He was not laid off in April, but was laid off in June. However, as noted, he was not alleged to be a discriminatee. Zayas scored 11 on the March 19 rankings, used for the April layoffs and a 12 on the May 12 rankings, used for the June layoffs, wherein

Continued

he was aware that Ward Deska was on “thin ice” with the company because Deska had substance abuse problems, and the company was always helping Deska out. Valentin further testified that he asked Kanniard about Desks possibly being one of the “snitches” because Kanniard “always had information about everyone in the plant regarding anything they did or anything that was going on. He was the guy that knew information.”<sup>42</sup>

My findings concerning the above July conversations between Kanniard and Valentin is based on a compilation of the credited portions of the testimony of Kanniard and Valentin as well as Valentin’s affidavit. While there was some uncertainty in Valentin’s testimony concerning precisely what Kanniard said in certain respects, overall I found him to be credible and his testimony generally consistent in most respects on cross-examination and with his affidavit. I also note that some of the comments made by Kanniard during these conversations, particularly that Respondent would shut its doors if the Union was brought in, was consistent with statements that I have found above were made by Kanniard himself to other employees and by Forchic to employees at group meetings. Finally, I also note that Kanniard did deny that he told any employee that he had former workers that could come over and run the plant in the event of a strike or that the company had another site that they were going to move to if the Union got in. Kanniard also denied that he told Valentin or anyone else that he knew who was a company snitch or that Deska was an informant or a company snitch,<sup>43</sup> or that the Union is not a good idea. Significantly, Kanniard did not deny making any of the other comments attributed to him by Valentin, as I have outlined above, particularly that Respondent would “shut its doors” if the Union was brought in. Indeed, Kanniard furnished no testimony as to what he did say to Valentin during these July conversations about the Union or the pending election. Nor did Kanniard deny that he ever had any conversations about the Union or the election with Valentin.

Accordingly, based on the above reasons, I credit Valentin, as I have detailed above, concerning the statements made to him by Kanniard in their conversations in July.

## VIII. Analysis

### A. The Status of Kanniard

The complaint alleges that Kanniard has been an agent of Respondent since November of 2009 and a supervisor and agent of Respondent since June of 2010. I find these assertions somewhat perplexing based on the record evidence as well as my examination of General Counsel’s brief. While the complaint alleges that Kanniard became a supervisor and an agent of Respondent in June of 2010, there is not a scintilla of evidence in the record that indicates any change of status for Kanniard in June of 2010. To the contrary, the parties have stipulated that Kanniard became a supervisor in October of 2010.

It appears that General Counsel has abandoned any contention that Kanniard became a supervisor in June since it makes no such suggestion in its brief. Indeed, while the status of

Zayas was included. Valentine also was aware that Rodney Carter had signed a union card, but wasn’t sure if he did so at the meetings as the Tick-Tock Diner. Carter, a first pressman, was not laid off either time. His scores were 15 and 19, respectively on the two layoffs. As noted, no first pressmen were laid off in June, but three were demoted to second pressmen (Bayard, Willison and Contreni). Their scores were 13, 12, and 13, respectively.

<sup>42</sup> In fact, by the time of these conversations, Kanniard had been promoted from press trainer to press supervisor.

<sup>43</sup> Kanniard also testified that he did not know anything about a company snitch.

Kanniard was litigated extensively, there is no record evidence that Kanniard exercised any of the indicia set forth in Section 2(11) of the Act at any time prior to his admitted promotion in October.

5 General Counsel has pointed to no such evidence, so I conclude that this complaint allegation has been implicitly withdrawn. In any event, I shall recommend that it be dismissed.

That still leaves the crucial issue for determination of whether Kanniard has been an agent of Respondent within the meaning of Section 2(13) of the Act.

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In this regard, the Board applies common law principles when examining whether an employee is an agent of the employer. Apparent authority will result from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. *Southern Bag Corp.*, 315 NLRB 725 (1994). The test is whether, under all the circumstances, “employees would reasonably believe that the alleged agent was acting on behalf of management when he took the action in question.” *California Gas Transport*, 347 NLRB 1314, 1317 (2006); *Great American Products*, 312 NLRB 962, 963 (1993). As stated in Section 2(13) of the Act, when making the agency determination, “the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.”

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I conclude based on my evaluation of the evidence, detailed above, concerning Kanniard’s functions, responsibilities and conduct, in agreement with General Counsel that the employees, here, would reasonably believe that Kanniard was reflecting company policy and speaking for management when he engaged in the conduct that I described above in the facts section of this decision, i.e. his comments to employees about the Union and the layoffs of employees.

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Here, while I have found that Kanniard did not exercise supervisory responsibilities sufficient to establish 2(11) supervisory status, his position and duties are relevant in determining agency status. It is well-settled that agency can be established when the employee is held out as conduit for transmitting information to the employees. *D&F Industries*, 339 NLRB 618, 619 (2003); *Hausner Hard-Chrome of KY*, 326 NLRB 426, 428 (1998).

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The evidence discloses that Kanniard’s primary responsibility was that of a trainer. In that capacity, he trained employees on how to operate and maintain the presses and other equipment. He was responsible for training employees on safety matters as well. In connection with these responsibilities, he assigned work to employees, was involved in overtime scheduling and assignments, and at times, moved and changed assignments of employees from one job to another, had keys to the facility, and at times, he was in charge of the facility (on weekends) and was the highest ranking official present at that time.

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Further, Kanniard was a salaried employee, was paid substantially higher than other employees and was treated by Respondent as an exempt employee. Indeed, when Respondent ranked its employees for layoff purposes, it ranked Kanniard in a group with other exempt employees, who were all 2(11) supervisors.<sup>44</sup>

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I find that the above evidence is sufficient to establish that employees would reasonably believe that Kanniard spoke to employees as a representative of management in these various

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<sup>44</sup> Deska, Fredericks and Metz.

matters, such as in training and direction of work, overtime, safety and changes in work assignments and that employees perceived them as much. *D&F Industries*, supra.

Thus, based on the foregoing evidence, I conclude that Respondent vested Kanniard with sufficient apparent authority to conclude that Kanniard served as a conduit between management and employees and that employees would reasonably believe that Kanniard was “speaking and acting for management” in his comments to employees. *D&F Industries*, supra, 339 NLRB at 619 (assistants to packaging manager moved employees from one job to another, administered employer’s policies regarding overtime and relayed management’s positions and views to employees); *Bill’s Electric, Inc.*, 350 NLRB 292, 301 (2007) (foreman found to be agent, who assigned and reassigned work to employees, conducted safety meetings, conducted training classes and assigned overtime and had higher pay than other employees); *Poly-America, Inc.*, 328 NLRB 667, 673 (1999) (lead men and trainer were agents, who assigned work, provided safety education, taught employees how to perform work, communicated management’s views and positions on employment matters); *Tim Foley Plumbing Services*, 332 NLRB 1432, 1433, 1439 (2000) (highly-paid plumber, who was, at times, highest ranking employee on job site, in which he assigned and directed work of employees); *Tyson Foods, Inc.*, 311 NLRB 552, 561-566 (1993) (trainer found to be an agent, who showed employees how to perform their jobs, a function previously performed by supervisors and conveyed to employees employer’s policies, philosophies and procedures); *Pitt Ohio Express*, 322 NLRB 867 fn. 2 (1997) (inbound planner found to be agent, where he assigned work, redirected work assignments as needed, was salaried and only employee with his status on duty at night); *Great American Products*, supra, 312 NLRB 962, 963 (lead man assigned work and moved employees from machine to machine); *Portsmouth Ambulance Service*, 323 NLRB 311, 314 (1997) (agent in charge when managers not present, assigned work to employees and maintained keys to offices); *Hohn Industries*, 283 NLRB 71, 73 (1987) (lead person found to be agent, who is conduit of orders and instructions from management, assigns work and maintains his own office at plant); *Hausner Hard-Chrome*, supra, 326 NLRB at 428 (department heads’ agents communicated instructions from management and implemented company policies on production floor); *Corrugated Partitions West*, 275 NLRB 894, 961 (1985) (lead man agent, who was in charge of shift, highest ranking employee in plant at time, assigned work and conduit between management and employees); *William Chalson & Co.*, 252 NLRB 25, 34 (1980) (assistant foreman distributed work to employees and shared an office with admitted supervisor); *Pittsburgh Metal Lithographing Co.*, 158 NLRB 1126, 1132, 1158 (1966) (agent assigned work to employees as well as overtime).

Another factor that the Board considers in assessing agency, although not dispositive, is whether the statements of the alleged agent were consistent with statements or actions of the employer. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001). The Board has frequently placed significant reliance on such consistency in supporting its finding of agency status. *D&F Industries*, supra, 339 NLRB at 620; *Hausner Hard-Chrome*, supra, 326 NLRB at 428; *Southern Bag*, supra, 315 NLRB at 735; *Great American Products*, supra, 312 NLRB at 963; *Dentech Corp.*, 294 NLRB 924, 926 (1989); *Jules V. Lane DDS*, 262 NLRB 1182 (1982); *Community Cash Stores*, 238 NLRB 265, 266 (1978); *William Chalson*, supra, 252 NLRB at 34. I find that the facts here strongly support the principles in the above cited precedent.

As detailed more fully above, Kanniard told Valentin in July of 2010 that if the Union comes in, Respondent would move and shut its doors. He also told Perez in March of 2010 that if the Union gained ground in organizing the shop, one option considered by Respondent was to close Secaucus and move work to Voorhees. These comments were similar to Forchic’s remarks to employees at meetings in late 2009 that he would not bargain with a union and close down the shop rather than let a union come in. Similarly, Kanniard himself at meetings with



employees in 2009 also told employees that based on his experience with unions in past jobs, all the union is going to do is to come in and “shut the doors.”

Further, Kanniard told Perez in January of 2010 that Respondent had been aware of union activity, had pictures of individuals gathering and meeting with union officials at diners and added that it was only a matter of time before Respondent “got rid of them all” and specifically named Wallace, Cole and Mattei as individuals, who “were in for a rude awakening and they would be the first to go.” Similarly, Kanniard told Fego during a conversation in May that Respondent “knows that you’re trying to organize the place. They think that you’re number one on the list.” Kanniard’s comments to Fego and Perez in this regard mirrored similar statements made by: supervisor Deska to Wallace (“watch your ass, they’re watching you, you need to watch out what you say to people”); Fredericks telling Wallace that he needs to stop talking to people that “they’re watching you, they think that you’re the organizer;” Whitmoyer instructing Wallace that he needs to stop talking to fellow workers about the Union; Valentine telling Wallace to “back off a little” in trying to convince employees to support the Union; supervisor Johnson telling Ball to watch himself because someone was “ratting” to the bosses and providing names of union supporters, which included several specifically named employees; Johnson informing Fego that Respondent knew that employees were trying to organize for the Union and knew that Cole and Fego were among the employees organizing for the Union as well as several instances of Fredericks interrogating employees about the union meeting at the Tick-Tock Diner the night before. Therefore, I find that these similarities in statements made by Kanniard to comments made by various management officials are strongly supportive of my finding that employees would reasonably conclude that Kanniard’s statements in these areas were reflective of Respondent’s position and views.

I also would find Kanniard’s agency status with respect to his comments at meetings conducted by Forchic is established further by the circumstances of the meeting and Kanniard’s having spoken to employees at Forchic’s request at a meeting in which Forchic expressed his own anti-union sentiments. In such circumstances, Kanniard’s agency status could be found independent of his job responsibilities and status, which I have found, detailed above, would also be sufficient to deem Kanniard to be perceived by employees as speaking for management. Thus, after Forchic gave his negative views on union representation, he asked Kanniard to come up front, said to the employees that this is as you know Ken Kanniard and that Ken is going to say a few words about his opinion on the Union. Kanniard then proceeded to discuss his experience with unions in prior jobs and observed that all unions do is take your money and do not do anything for the employees. Kanniard added that all the Union is going to do is to come in and “shut the doors” and as a result employees lose jobs. At that point, Forchic interrupted Kanniard and interjected, “I can’t say that, I won’t say that.”

I conclude that in these circumstances, Respondent by Forchic placed Kanniard in a position in which employees could reasonably believe that his statements were made on behalf of Respondent and reflected its policies. *Beverly California Corp.*, 326 NLRB 232, 234-235 (1998) (rank and file employees found to be agents of employer, where administrator repeatedly called on anti-union employees at captive audience meeting called by employer, who expressed anti-union views, which dovetailed with Respondent’s position voiced in meeting); *Allegheny Aggregates*, 311 NLRB 1165, 1166, 1168 (1993) (customer of employer, who employees mistakenly believed was part-owner met with employees at a meeting in which company president had been scheduled to attend; president, on advice of counsel, decided not to attend meeting but asked customer to apologize to employees for his absence and to, nonetheless, proceed with meeting; Board finds in these circumstances that customer was agent for employer with respect to customer’s anti-union remarks); *Futuramik Industries Inc.*, 279 NLRB 185 (1986) (employee found to be agent of employer, where she stood alongside

president during pre-election meeting and answered questions directed at president without interference).

Respondent argues with respect to this meeting that Forchic's statements to employees that "I can't say that, I won't say that" after Kanniard's remarks constitutes an effective disavowal of Kanniard's comments. I disagree. Forchic did not rebuke or criticize Kanniard for making these statements nor did he disagree with the substance of the remarks or say that Respondent had no intention of shutting the doors if the Union came in. He merely said that he (Forchic) can't say that, presumably based on his attorney's advice. That statement did nothing to dispel the impression among employees that Kanniard's statement was consistent with Respondent's views but merely that Forchic cannot express it.

Lastly, I also rely in part on Respondent's subsidizing the apartment of Kanniard as well as the relationship between Kanniard, McNair and Valentine. Thus, Respondent paid for Kanniard's apartment, which he shared with McNair.<sup>45</sup> Respondent provided this benefit to Kanniard and McNair as an inducement to persuade them to work for it since they both had families and homes in areas too far from Respondent to permit commuting. This benefit was not provided to any rank and file employees. While it is certainly understandable that Respondent would provide such a benefit to highly-sought skilled employees needed to assist Respondent to show employees how to operate the new presses, it also demonstrates in my view that employees, being aware of this arrangement, would be more likely to perceive Kanniard's status as managerial and his comments as coming from management.

Similarly, his relationship with McNair (with whom he shared an apartment) and with Valentine also in my view would also have such an effect on employees' perception of Kanniard's statements and conduct. Kanniard, McNair and Valentine were all formerly employed by DGM and had all been involved in the installation of the DGM presses at Respondent's Secaucus facility. Valentine became the plant manager at that facility, and McNair was shift supervisor. The three of them continued their friendship while employed by Respondent. They were always together at work, ate lunch together, hung out together after work and according to the perception of employees seemed to be "connected at the hip." A number of employees referred to them as "the three amigos."

I find that this evidence is also supportive of my conclusion, set forth above, that employees would reasonably view Kanniard's comments to them concerning unions and management as reflective of Respondent's positions and views on these matters.

Accordingly, based on the foregoing analysis, I find that at all times since November of 2009, Kanniard has been an agent of Respondent under Section 2(13) of the Act.

#### B. The Alleged Threat to Close

I have found above that during a July conversation between Kanniard and Valentin about the upcoming election, Kanniard told Valentin that if the Union was brought in, the place will shut its doors. Kanniard also told Valentin that if the Union is voted in next month, "we got our eyes on another plant and we'll move the presses."

I conclude that since, as I have found above, Kanniard was an agent of Respondent at the time of his July comments, Respondent is responsible for his comments, particularly, where

<sup>45</sup> Respondent also paid for McNair's apartment.

as here, they mirrored similar comments by Forchic to employees in 2009. I, therefore, find that by the statements of Kanniard, Respondent has threatened to close the plant in violation of Section 8(a)(1) of the Act. *Stabilus Inc.*, 355 NLRB #161 (2010); *Avondale Industries*, 329 NLRB 1064, 1092 (1999).

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### C. The Layoffs

Here, General Counsel does not challenge the lawfulness of Respondent's business decision by Respondent that the layoffs were warranted and based on business considerations in April and June 2010. General Counsel does contend, however, that Respondent unlawfully selected the six discriminatees (Cole, Wallace and Mattei in April and Fego, Amato and Ball in June), here, because of their union activities.

The analysis of discriminatory motivation cases involving alleged unlawful selection for layoff is no different than typical discrimination cases where discharges or layoffs are alleged to be motivated by union or protected conduct. *Merrill Iron & Steel Inc.*, 335 NLRB 171, 173 (2001). The Board applies the test set out in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), wherein the General Counsel must show by a preponderance of the evidence that protected activity was a motivating factor in the decision to layoff these employees. In connection with this burden of proof, General Counsel needs to show that the employees engaged in union or concerted activities, that Respondent had knowledge of that activity and that Respondent demonstrated anti-union animus. Once the General Counsel has made the required showing, the burden shifts to the Respondent to demonstrate that it would have taken the same action, even in the absence of the protected union activity. *Merrill Iron & Steel*, *supra*; *Wright Line*, *supra*.

Here, all of the elements necessary to establish General Counsel's *prima facie* burden are present with respect to all six discriminatees. All of them signed union cards, attended union meetings and discussed the Union with their fellow employees at Respondent's premises.

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Cole and Fego were two of the three primary union advocates and contacts with union representative Doklia during the union campaign.<sup>46</sup>

Cole, Fego and Puntiel were the three solicitors of employees' signing cards for the Union. They were subsequently joined by Wallace and Amato, who were initially skeptical of supporting the Union. Wallace, in fact, was against unionization at the start of the campaign, but felt rather that it would be better to negotiate directly with Respondent with himself as spokesperson. In that regard, Wallace, who had previously engaged in discussions with his co-workers concerning common complaints about their terms and conditions of employment, prepared a set of proposals to present to Respondent on behalf of himself and other employees, expressly to persuade Respondent to accede to these demands to head off the employees' unionization campaign. Indeed, Wallace expressed these sentiments directly to management officials, and Hager and Woodman met with Wallace to discuss and consider his proposals. Although Hager was sympathetic to some of Wallace's suggestions and recommended them to Forchic, these recommendations were rejected.

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Once Respondent failed to respond to Wallace's proposals, he decided to change his

<sup>46</sup> The third primary union advocate was Pedro Puntiel, who was the only employee present with Fego at the initial first meeting with Doklia when organizing was discussed and cards were first signed.

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mind about the Union and began to support the Union, starting in early 2010. He signed his card, attended union meetings and began to earnestly solicit other employees to sign cards, including speaking to employees working on other shifts, wherein Wallace would speak to them when he was in early waiting for his shift to begin while the other employees were still working.

5 Wallace continued to engage in this conduct, even after being warned not to do so by several supervisors (Woodman, Fredericks and Valentine).

Amato was initially uncertain about supporting the Union, but decided to do so in March of 2010 and signed a card at the union meeting on March 19. After signing his card, Amato

10 spoke to several other employees about signing cards for the Union, wherein he would suggest that these employees sign cards and/or meet with Doklia to discuss the Union and sign cards. Amato arranged for a meeting between Doklia and two employees, who both signed cards for the Union.

15 Neither Ball nor Mattei were active solicitors for the Union amongst the employees and did not attempt to solicit other employees to sign cards. They did, as noted above, sign cards and attended union meetings. Additionally, Mattei was an experienced employee and well-respected by his fellow employees at Respondent and also carpooled to work with Cole, with whom he also worked on the same crew along with Ball.

20 The evidence is more than sufficient to establish Respondent's knowledge of the union activities of and support of each of the six discriminatees. The most substantial evidence of Respondent's knowledge of union and protected activities exists with respect to Wallace. Wallace initially was opposed to the Union because he felt that direct bargaining with employees with himself as spokesperson would be a preferable alternative to unionization. In that regard,

25 Wallace engaged in protected concerted discussions with fellow employees concerning working conditions and made to management a PowerPoint presentation of the employees' demands that he prepared. Thus, he was clearly engaged in protected concerted activities in such conduct, which included discussions about these matters while these employees were working.

30 Respondent was clearly aware of such conduct by Wallace.

However, as noted above, when Respondent failed to timely respond to the suggestions that Wallace made to Respondent about changes in working conditions, Wallace changed his mind about the Union, signed a card at a union meeting and began to forcefully advocate for the

35 Union with fellow workers, including those who worked on different shifts from him before his shift started.

I find the evidence establishes that Respondent became aware of this conduct by virtue of the emails between management representatives, described above, wherein they discussed supervisors warning Wallace not to talk about the Union to other employees while these

40 employees were working. These emails further convince me that despite Wallace's admitted continued assertions to management officials that he was not a union supporter, even after he had changed his mind, signed a card and had started to solicit employees to sign union cards, that management was skeptical of Wallace's assertions in this regard and, in fact, did not

45 believe him. These emails also persuade me to discredit Hager's testimony that he believed Wallace's assertions to him and other management officials that he (Wallace) was not a union supporter. Hager was cc-ed on the emails from Valentine and Fredericks on January 16, wherein all these management officials (Fredericks, Woodman and Valentine) concurred in the belief that Wallace was not being truthful in his assertion to management representatives that

50 he is not a union supporter since he was observed by supervisors talking to employees about the Union. Indeed, the emails confirm that supervisor Fredericks told Wallace that he "needs to stop talking to his fellow workers about the union and start focusing on his job."

I also find Hager's testimony that he is so busy and receives so many emails at work that he does not remember seeing these emails from Valentine and Fredericks describing Wallace's union activities and their reaction to it, unpersuasive. Clearly the union organizing was of concern to Forchic, Respondent's president and chief executive officer at the time that the union campaign started. Forchic was adamantly opposed to the unionization of Respondent's employees. Respondent immediately upon finding out that a union leaflet was found on a car began anti-union supervisory training and held five meetings with employees, wherein he expressed his and Respondent's anti-union views, which included threats to close the plant. Further, emails were sent between Respondents officials concerning articles in the press detailing plant closings for possible use in future campaign meetings or leaflets. Thus, the union campaign was a major issue for Respondent, and I find Hager's testimony that he was busy and that he didn't remember management emails discussing perceived union supporters, such as Wallace, to be unbelievable.

Hager's testimony in this regard is further undermined by his own email to Cohen in October of 2009, wherein he summarized his meeting with Wallace. Hager commented in that email that Wallace had informed him at the meeting that the Union was not the way to go, but added that Wallace is "very well versed in the workings of a union. Again, I want to take him at his word but we need to manage this cautiously." These comments by Hager to Cohen reflect that he was obviously skeptical of Wallace's denials of union interest, but would recommend watching him carefully. Hager further attempted to explain his email by asserting that he thought that Wallace was trying to ingratiate himself with Respondent and become a supervisor by helping it to thwart unionization.<sup>47</sup> Thus, when Respondent failed to either implement any of Wallace's suggestions to improve working conditions or to promote Wallace to supervisor, Wallace became an active union supporter, as Respondent had feared, Respondent in general and Hager in particular, became aware of that conduct. I so find.

Further evidence of Respondent's knowledge of Wallace's union activities is found in supervisor Deska's warning to Wallace in late January to "watch your ass. They're watching you. You need to watch out what you say to people." Additionally, on January 11, Fredericks informed Wallace that he needs to stop walking around and talking to people that they are watching you and they think that you are the organizer.<sup>48</sup>

Finally, in late February or March, Valentine summoned Wallace into his office. Valentine informed Wallace that an employee had complained to him that Wallace was intimidating them into joining a union, and Valentine wanted it stopped. Valentine refused to disclose to Wallace which employee had made such an accusation. Wallace denied to Valentine that he had intimidated anyone, but admitted to Valentine that he had simply presented the pros and cons of union membership and informed them to contact Doklia if they are interested and if they did they

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<sup>47</sup> I note that Hager's email is corroborated by Cohen's email, agreeing with Hager's summary of the meeting with Hager, in which she participated by conference call. Cohen observed, "I agree that Joe is keeping all his options open, and though he says that the union is not the way to go, he does seem to want to get something out of this for himself, and he likes to be in the role of spokesperson and leader."

<sup>48</sup> I note that this conversation is essentially confirmed in Fredericks' email to Valentine, which was in turn forwarded to Hager with Valentine's comments concerning the report to him of the January incident between Whitmoyer and Wallace, wherein Whitmoyer again told Wallace not to speak to employees before his shift and reflected Whitmoyer's skepticism, concurred by Fredericks that Wallace was not being truthful in his denials of being an union supporter.

would be welcomed with open arms. Valentine then stated that he would appreciate if Wallace “backed off a little.” This evidence further establishes that Valentine was aware that Wallace was soliciting employees to join the Union and that Valentine asked him to “back off a little” concerning such discussions of the Union with employees.

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The evidence concerning Respondent’s knowledge of the union activities of Fego and Cole is also compelling. Fego appeared to testify at the representation hearing on behalf of the Union.<sup>49</sup> In early May, Kanniard left an article on union pensions on Fego’s work area. Fego wrote “thanks” on it and returned the article to Kanniard. Kanniard told Fego that he was only joking. Later, on that day, Kanniard informed Fego that the “company knows that you are trying to organize the place. They think that you are number one on the list.”

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Furthermore, Whitmoyer was terminated by Respondent from his position as pressroom manager on April 19. After he was terminated, Whitmoyer shook hands with the employees under his supervision, including Fego, and wished them good luck. When he spoke to Fego, Whitmoyer added, “Good luck with your union.”

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Additional evidence of Respondent’s knowledge of Fego’s union activities is provided by Fredericks’ approaching Fego the day after the union meeting at the Tick-Tock Diner, where employees signed cards for the Union and Fego was present,<sup>50</sup> and asked, “How the union meeting went at the Tick-Tock Diner.”

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Finally, supervisor Dan Johnson told Fego in January that Respondent knew that the employees were trying to organize a union, and that he warned him to “be careful because the company knew that he and Cole were trying to organize the union.”<sup>51</sup>

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This conversation between Fego and Johnson is also probative evidence of Respondent’s knowledge of Cole’s union activities. Further evidence of such knowledge consists of Fredericks questioning of Cole about union meetings at the Tick-Tock Diner on two separate occasions,<sup>52</sup> Kanniard’s question to Cole (in Fego’s presence), “When the Union gets in are you going to be the shop delegate or shop steward, and Johnson’s comment to Ball that among others that Cole’s name, including Ball’s, was mentioned to management by an employee (Ricky Lawrence) as a union supporter, and Fredericks’ comment to Perez in January that Respondent had a picture of individuals meeting with union officials at diners, and specifically mentioned the names of Mattei, Cole and Wallace as among those employees, who were present and who Respondent would be “getting rid of.”

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This conversation with Kanniard also supports an inference of Respondent’s knowledge of Mattei’s (as well as of Wallace’s) union activities. I also note that Mattei carpooled to work with Cole, which leaves some grounds for a reasonable assumption that Respondent might

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<sup>49</sup> Prior to the representation hearing on June 10, Valentine had a conversation with Fego about the Union, wherein they discussed that Fego was in favor of the Union. Valentine urged Fego to keep an open mind, and Valentine told Fego that he thought the employees were “making a mistake.” Valentine reported his conversation with Fego in an email to Cohen and Hager on June 11.

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<sup>50</sup> Fego had signed his card at a prior union meeting.

<sup>51</sup> Johnson was a personal friend of Fego and had this conversation a few weeks before Johnson left Respondent for a new job.

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<sup>52</sup> One of these interrogations involved Fredericks asking a group of employees, including Cole, Mattei, Ball and two other employees.

have believed that Mattei shared Cole's well-known support for the Union.

As for Ball, he, as noted above, was among a group of employees, whom Fredericks questioned about the meeting at the Tick-Tock Diner on December 10, 2009. As also related above, Johnson spoke to Ball in January of 2010 and told him that employee Lawrence had given the name of a number of employees to management as union supporters. Johnson informed Ball that he was one of those names given to management and warned Ball that "you need to watch yourself." When asked what Johnson meant, Johnson informed him about Lawrence "ratting" to the bosses and providing names of union supporters and told Ball to "watch himself" and "work a little harder" and "keep his nose clean." Also, sometime in April, Ball and McNair were discussing unions, and McNair informed Ball that there is no union in Tennessee, where Ball's grandparents were from. McNair then asked Ball, "How do you feel about a union being at AFL?" Ball replied, "I'm for a union." The above evidence is more than sufficient to establish Respondent's knowledge of Ball's union support and activity.

Finally, Amato signed his card on March 19 at a union meeting at the Legends Diner along with employee Matt Deska. Shortly, thereafter, Perez and Kanniard were smoking a cigarette in front of the premises when Amato and Fego passed them by and entered the building. Kanniard informed Perez that Amato had attended a union meeting at the Legends Diner and that Amato had signed a card. Kanniard told Perez that someone was providing Respondent with this information, but did not tell Perez at that time who it was that had done so.

In May, Amato was told by Kanniard that he (Amato) was going to be the "next union representative." Furthermore, later on in May, Fredericks approached Amato while he was talking to employee John Bayard. Fredericks asked them, "When is the next union meeting?"

I find the above evidence sufficient to establish that Respondent was also aware of Amato's support for and activities on behalf of the Union.

That leaves the last, and perhaps most significant, aspect of General Counsel's burden of establishing that a motivating factor in Respondent's decision to select these employees was their union activities and conduct, that is the presence of anti-union animus.

The evidence presented by General Counsel is compelling in this respect, particularly, the comments of Kanniard, who, as detailed above, is an agent of Respondent under Section 2(13) of the Act. Thus, his statements made to employees are attributable to Respondent and can be construed as reflective of Respondent's policies and relevant to an assessment of Respondent's decision to select these six employees to layoff in April and June of 2010.

The only violation of Section 8(a)(1) alleged in the complaint is the threat to close the plant by Kanniard in July, which I have found to be violative of Section 8(a)(1) of the Act. This statement is a significant demonstration of animus, particularly, where it mirrors the similar comments by President Forchic in his meetings with employees.

Respondent argues that animus, for the purposes of assessing discriminatory motivation, cannot be found based on evidence that is not alleged as conduct violative of the Act. It argues, therefore, that much of the evidence detailed above, revealing conduct and statements made by various supervisors and agents of Respondent that could be construed as unlawful threats, warnings, interrogations or giving the impression of surveillance cannot be considered in establishing anti-union animus since there were no compliant allegations alleging this conduct to be violative of the Act. *International Alliance of Theatrical Stage and Moving Picture Operators (Hughes-Avicom International)*, 322 NLRB 1064 (1997); *Corry Contract*, 289

NLRB 396 fn. 3 (1988). I disagree.

The cases cited by Respondent deal with a different issue, dealing with the appropriateness of making an unfair labor practice finding, where an allegation has not been alleged in the complaint. That is not the issue here since I am not making a finding that Respondent's conduct in any of these incidents violated the Act. The complaint does not so allege, and General Counsel does not request that I do so.

However, it is appropriate to consider this evidence in assessing animus, even though the conduct could have been alleged independently as an unfair labor practice. Some of the conduct, such as the comments of Forchic and Kanniard at the 2009 meetings, occurred outside the 10(b) period and could not have been alleged as independent violations of the Act. Some of the other conduct did occur within the 10(b) period, and while General Counsel could have alleged this conduct as violative of the Act or request that the complaint be amended to do so, it chose not to do so. Nonetheless, that does not preclude the General Counsel from relying on such conduct as evidence of anti-union animus. *Facchina Construction Co.*, 343 NLRB 886, 887 fn. 5 (2004).

Much of the evidence in this regard is detailed above in my discussion of the evidence establishing Respondent's knowledge of the union activities of the discriminatees, but it is also probative of animus and the reasons for Respondent's decision to select the employees for layoff.

This evidence also is consistent with President Forchic's statements of animus in his 2009 speeches to employees, wherein he threatened to close the plant if the Union came in. I note further the evidence of emails in early 2010 amongst Respondent's officials, wherein it is clear that Forchic was intent on connecting the possibility of plant closure with the Union's becoming the employees' representative in employees' minds. It is true as Respondent argued at trial in seeking to exclude this evidence at trial that Respondent has free speech rights to disclose its views on union organization to employees and that in certain limited circumstances, it can be appropriate for the employer to raise the possibility of plant closing in the context of a discussion of the union.<sup>53</sup> However, here, the statements made by Forchic as well as the similar comments made by Kanniard do not come close to meeting the *Gissel* standard for a lawful prediction and would be, and is, violative of the Act. *Intermet Stevensville*, 350 NLRB 1349 fn. 4 (2007). The emails referred to above, therefore, constitute additional evidence of animus towards protected conduct of Respondent's employees.

A significant portion of this evidence consists of conduct and statements of Kanniard. Since I have found Kanniard to have been an agent of Respondent since 2009, his conduct is attributable and relevant in assessing animus as well as the reasons for Respondent's selection of the six discriminatees for layoffs. *D&F Industries*, supra, 339 NLRB at 621, 622; *Merrill Iron & Steel*, supra, 335 NLRB at 173 (agent's prediction that company would get rid of union sympathizers persuasive evidence of employer's animus).

The evidence supportive of these conclusions includes: (1) Kanniard informing Perez in January that Respondent had pictures of workers meeting with union officials at diner, it was only a matter of time before the company "got rid of them all," and that Cole, Mattei and Wallace

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<sup>53</sup> *NLRB v. Gissel Co.*, 395 US 575, 616-620 (1969) (prediction of job loss or plant closure can be lawful if carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrate probable consequences beyond its control).



“would be the first to go”; (2) in March, Kanniard informed Perez that Amato and Fego had just come from the Legends Diner, where Amato had signed a card and that Amato, Fego and Ball were next on the “company’s radar” and would be the next to be terminated; (3) Kanniard informed Perez in March that Respondent was weighing several options in case the Union gained ground in organizing the shop (the options mentioned by Kanniard included closing the Secaucus plant and move all the work to Voorhees plant and added that someone had come in to take measurements of the press in preparation for a move; the other option mentioned by Kanniard was to bus the Voorhees workers into Secaucus and let them to the work).

These statements of Kanniard provide compelling evidence of animus and anti-union motivation for Respondent’s selection of the six discriminatees.

Further evidence of statements from Respondent’s admitted supervisors also corroborates Kanniard’s assertions. This evidence includes: (1) Johnson telling Ball in January that he needed to watch himself and work harder because someone was “ratting” to the bosses and providing the names to management of union supporters, which included Ball, Mattei and Cole and urging Ball to “keep his nose clean;” (2) Johnson telling Fego in January that Respondent knew that Cole and Fego were among the employees organizing for the Union and warning Fego to “be careful.”

These remarks by Kanniard to Fego and Ball represent additional substantial evidence of Respondent’s knowledge of union activities of Fego, Ball, Cole and Mattei, and which also represents evidence of animus. *Bruce Packing Co.*, 357 NLRB #93 ALJD slip op at 10 (September 28, 2011) (statement warning employee to “be careful” in context of discussion of union activity, an implied threat of reprisal); *Jordan Marsh Stores*, 317 NLRB 460, 462-463 (1995) (statements by supervisor to employees to “watch out” and “watch your back” in connection with union activity, implied threat of reprisal). Accord, *Gaetano & Assc.*, 344 NLRB 531, 534 (2005); *St. Francis Medical Center*, 340 NLRB 1370, 1383-1384 (2003).

Similarly, Valentine’s comment to Wallace that he should “back off” in attempting to persuade employees to support the Union and supervisor Deska’s statements to Wallace that he should “watch your ass, they’re watching you, you need to watch what you say to people” are further instances of implied threats of reprisal of Respondent’s animus towards Wallace’s protected union activities.

The evidence also discloses that in 2009, shortly after the union meetings held at the Tick-Tock Diner, supervisor Fredericks on three different occasions approached several employees, including Fego, Cole, Mattei and Ball, and asked them how the union meeting had gone at the Tick-Tock Diner. These comments of Fredericks would represent unlawful interrogations as well as the creating the impression of surveillance had they been within the 10(b) period and/or alleged as violations of the Act. With respect to creating the impression of surveillance, it is noteworthy that there is no evidence that the employees publicized either the existence of or the location of the meeting. In such circumstances, it is reasonable to conclude that since Fredericks did not disclose to the employees the source of this information that there was a union meeting that employees attended at the Tick-Tock Diner, employees would reasonably assume that their union activities were under surveillance by Respondent. *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1296 (2009) (questioning employees about attendance at union meetings unlawful interrogation as well as creating impression of surveillance); *United Charter Service Inc.*, 306 NLRB 150, 151 (1992) (operations manager created the impression that employees’ union activities were under surveillance by informing them that he knew about the employees’ union meeting).

Furthermore, I also found above that in July Kanniard told employee Valentin that at one of the union meetings at the Tick-Tock Diner, Respondent's supervisors were hiding in a truck or a SUV outside the diner and watching everybody going in and out of the diner. I find that this comment of Kanniard constitutes an admission that Respondent engaged in actual surveillance of its employees' union activities, which would be violative of Section 8(a)(1) if it had been so alleged, but which I can and do consider as further evidence of Respondent's anti-union animus.

I also conclude in agreement with General Counsel that in several instances Respondent's conduct towards Wallace and Cole could have been violative of the Act had they so been alleged and can be considered as further evidence of animus towards protected conduct of its employees.

As I have detailed above, Whitmoyer warned Wallace on two occasions not to talk to employees on the floor before his shift started, once in November of 2009 and again in January of 2010, to get off the floor and wait in the lunchroom until his shift started. Whitmoyer further told Wallace in January that if he kept this disruption up, Respondent would write him up. Similarly, on January 16, Fredericks told Wallace that he needs to stop walking around and talking to people. Notably, in Fredericks' own email to Valentine reporting on the incident, Fredericks stated that he told Wallace that he "needs to stop talking about the union and start focusing on his job."

I conclude that in each of these incidents, Respondent has warned Wallace not to speak with other employees and to stay out of the shop until his shift starts in response to Wallace's engaging in protected conduct. Notably, prior to the union campaign and prior to Wallace engaging in protected concerted conduct of discussing terms and conditions of employment with his co-workers, Wallace had consistently arrived at Respondent's premises prior to the start of his shift and would normally spend time before his shift started talking to employees still working on the preceding shift. He had never been spoken to about conduct by any supervisors and was never informed by supervisors that he must not be on the floor until his shift begins. Further, Wallace had noticed employees coming in early and speaking to employees on other shifts, who were still working, who were not spoken to by management about such conduct.

However, in November of 2009, after the start of the union campaign and after he began to discuss both the union campaign and the employees' complaints about working conditions with employees working on the prior shifts, Whitmoyer called Wallace into his office. Whitmoyer informed Wallace that Respondent did not want him on the floor talking to employees, who were working before his shift started, because it was disruptive of their work. Wallace asked why all of a sudden there is an interest now and inquired if it was because of the Union and added that he was not "the organizer here." Whitmoyer replied that the instructions had nothing to do with the Union, but significantly did not answer Wallace's inquiry as to why now "all of a sudden" Respondent considered his talking to employees before his shift started to be disruptive of their work.

It is also true that at that point in time, Wallace had not signed a union card and had, in fact, been telling employees that in his opinion it is better to forgo union representation and instead discuss improvements in working conditions directly with Respondent with Wallace as spokesperson. Nonetheless, the union campaign had started and Wallace's discussions with employees on the prior shifts included these issues of protected activities.

Since the evidence is uncontradicted<sup>54</sup> that Respondent's admonition to Wallace was unprecedented and contrary to established past practices, Respondent has provided no explanation why it suddenly considered Wallace's talking to employees working on prior shifts to be "disruptive" in November of 2009 when it had not done so in the past.

In these circumstances, I conclude that Respondent, by Whitmoyer's conduct, unlawfully prohibited him from speaking to employees and appearing on the floor of Respondent's premises until his shift started, which would be violative of the Act had it been alleged in the complaint. *Intermet Stevensville*, supra, 350 NLRB at 1354, 1390 (employer's conduct in prohibiting employees from remaining in plant after ended and restricting them from talking breaks in a different department, both contrary to past practice, found to be unlawfully motivated by the advent of the union campaign).

This conduct was repeated by Respondent in January of 2010 by Whitmoyer and Fredericks. Fredericks told Wallace to stop talking to fellow workers about the union and start focusing on his work. In this same conversation, Fredericks informed Wallace that Respondent was watching him and that Respondent thinks that he (Wallace) was the (union) organizer. This incident was confirmed by an email from Fredericks to Valentine, which, in turn, was forwarded by Valentine to Forchic, Hager and Cohen.

This incident clearly demonstrates, based on Fredericks own words that Wallace "stop talking to fellow workers about the union," that Respondent's prohibition on Wallace's conduct was unlawful.

Eight minutes after Valentine forwarded Fredericks' email to Cohen, Hager and Forchic, he (Valentine) sent another email to these three Respondent's officials. This email reflects that Whitmoyer had informed Valentine that Wallace had come in early and started talking to employees. Whitmoyer related that he told Wallace to get off the floor and wait in the lunchroom until his shift started. Whitmoyer further told Wallace that if he kept this disruption up, Respondent would write him up. Whitmoyer further ordered Wallace to get off the floor and wait in the lunchroom until his shift started, coupled with a threat to write him up if he continues to speak to employees would be a further instance of unlawful conduct. *Intermet Stevensville*, supra. While, again, I cannot and do not make an unfair labor practice finding as to these incidents, I can and do find them to be further evidence of Respondent's animus towards Wallace's protected activities.

I find similarly with respect to Respondent's conduct towards Cole. Thus, the record establishes that prior to March 1, it was common practice at Respondent for both employees and supervisors to use their cell phones on the job, even while the press was running. Cole had done so many times in the past and had been seen by several supervisors, such as Johnson, Metz and Fredericks, and even Valentine, and was never informed that this conduct was forbidden or against company policy.

However, on March 1, while Cole was sending a text on his cell phone, he was approached by Valentine. Valentine said to Cole, "This is fucking bullshit. You have a fucking job to do."

Later on in the day, Valentine called Cole into his office, gave him a "verbal warning," which Valentine confirmed in a written "performance note," which was part of Cole's personnel

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<sup>54</sup> Whitmoyer did not testify.

file. The note reflects that Valentine informed Cole that he must pay attention to the presses when a job is running and not doing other things and that Cole was informed that the meeting constituted a verbal warning.

5 During this meeting, Cole complained that everyone hated working for the “three amigos,”<sup>55</sup> that they were ruining the company, nobody was getting paid what they deserved, conditions weren’t fair, everybody, including Cole, was unhappy working there and Valentine was the big problem. Valentine retorted that if Cole didn’t like working at the company, he could “walk out the door.” Indeed, Valentine’s own performance note of the meeting reflects that Cole  
10 stated that he and everyone dislikes working at Respondent and that Valentine was creating a rift between supervisors and employees.

15 I find that this incident, like Respondent’s previously discussed conduct towards Wallace, wherein it unlawfully prohibited Wallace from speaking to employees and appearing on the floor before his shift was to start, was also motivated by Cole’s protected activities.

20 I note that similar to Wallace’s situation Respondent consistently permitted employees to use their phones while working without incident or any indication that such conduct was against company policy. However, on March 1, after the campaign had began, in which Cole was one of the leaders of which Respondent was aware, as I detailed above, Valentine criticized Wallace for using his cell phone and using profanity in doing so. Valentine issued a verbal warning to Wallace for this conduct, which was confirmed in a performance report placed in Wallace’s personnel file. I find that this unprecedented rebuke and warning to Cole for engaging in cell  
25 phone use, accompanied by profanity, to be motivated by his union activities, which would be violative of the Act if alleged. *Intermet Stevensville*, supra. Since there is no complaint allegation asserting this conduct to be unlawful, I make no such unfair practice finding. I can and do, however, as in the case of the conduct of engaged in with respect to Wallace, related above, as well as other unalleged conduct by other supervisors and agents of Respondent, consider Respondent’s criticizing Cole and issuing him a warning to be evidence of Respondent’s animus  
30 towards Cole’s protected conduct.

35 I also note that during the meeting, in which he was warned, Cole engaged in protected concerted activity by complaining to Valentine about common terms and conditions of employment, including that he (Cole) and other employees hated working for the “three amigos” (which included Valentine), nobody was getting paid what they deserved and conditions weren’t fair. In response to this comment, Valentine replied that if Cole didn’t like working for the company, he could “walk out the door.” Valentine’s comment to Cole in response to the exercise of protected concerted complaints would represent another unlawful statement. The Board has held that such statements convey the message to employees that complaints about working  
40 conditions and employment are incompatible and implicitly threaten to discharge those, who would voice them. *Stoody Co.*, 312 NLRB 1175, 1181 (1993); *Paper Mart*, 319 NLRB 9 (1995); *Hialeah Hospital*, 343 NLRB 391, 394 (2004) (statements made by employer that if employees didn’t like working for employer, they could quit or seek other employment found to be implied threats of discharge).

45 Once again, I find that this comment by Valentine to Cole, though not alleged as violative of the Act, represents additional evidence of Respondent’s animus towards Cole’s exercise of protected concerted conduct.

50 <sup>55</sup> The “three amigos,” as noted above, was the nickname given by some employees to Valentine, Kanniard and McNair.

Based on the foregoing analysis and authorities, I conclude that General Counsel has made an extremely strong and compelling showing that the protected conduct of the six discriminatees was a substantial motivating factor in Respondent's decision to select them for  
 5 layoff. This is particularly strong where the evidence discloses, as noted above, that supervisors and agents of Respondent expressly predicted that the six discriminatees would be the next employees to be laid off or terminated because of their union involvement.

Where as here, the General Counsel's prima facie showing of discriminatory motivation  
 10 is strong, Respondent's burden of proof under *Wright Line* to show that it would have taken the same action is substantial. *Wild Oats Markets Inc.*, 344 NLRB 717, 743 (2005); *Vemco Inc.*, 304 NLRB 911, 912 (1991); *Eddyleon Chocolate*, 301 NLRB 887, 889 (1991).

Here, I conclude that Respondent has fallen short of meeting its substantial burden of  
 15 proof in this regard.

Respondent asserts that it selected the six employees for layoff along with numerous others based on a uniformly applied system of evaluating employees based on a numerical rating system previously used by Respondent in connection with prior layoffs and that the  
 20 decision to select the discriminatees for layoff as well as that of others laid off (not alleged to be discriminatory) were based solely on their scores on Respondent's rating forms. It further argues that the decision makers involved in the decision to select the discriminatees for layoff, including the supervisors directly involved in preparing the rating sheets, had no knowledge of any specific individual's union activities and did not exhibit any union animus in their conduct  
 25 and statements.

With respect to the latter to assertions made by Respondent, I have detailed above extensively the evidence of knowledge and animus derived from conduct of a number of supervisors and agents of Respondent, which are attributable to Respondent. Further,  
 30 Respondent's assertion that the decision makers and supervisors involved in the ratings of employees did not have direct knowledge of any specific union activities of any of the discriminatees is not correct.

Thus, Hager, the primary decision maker in the decision to select the discriminatees for  
 35 inclusion in the layoffs, according to his testimony, was clearly aware of Wallace's union activities and support. I have, as detailed above, rejected Hager's testimony that he believed Wallace's assertion to him and other management officials that he was not a union supporter to be truthful. Indeed, several supervisors and managers have established that Hager was made aware that these supervisors and managers (Fredericks, Valentine and Whitmoyer) all believed  
 40 that Wallace was not being truthful when he continued to insist to Respondent's officials that he was not a union supporter. Indeed, Hager was also aware of what I have found to be unlawful warnings and prohibition issued to Wallace by management officials for engaging in union activities. These unlawful warnings and admonitions were made by Whitmoyer, who was one of the supervisors who prepared the rating sheets, and by Valentine, who was also involved in the  
 45 decision to layoff employees.<sup>56</sup>

Additionally, Forchic was still the president and chief executive officer of Respondent at

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<sup>56</sup> Although Valentine did not fill out the rating sheets, various emails as well as Hager's  
 50 testimony establish that Valentine was involved in the decision as to which employees and/or which classifications should be included in the layoffs.

the time of both layoffs. Although Forchic's testimony tends to show that Forchic had minimal involvement in the decision-making process, Hager conceded that Forchic did approve Hager's recommendations concerning the employees to be laid off. As noted above, I have found that Forchic threatened employees at group meetings with plant closure and was present and invited  
 5 Kanniard to speak at other meetings, wherein Kanniard made similar threats of plant closure to employees.

Further, the testimony adduced by Respondent's witnesses, who testified about the selection process and decision, Rittereiser and Hager, I found to be vague, unconvincing,  
 10 uncertain and unpersuasive and far from sufficient to establish that Respondent would have selected the discriminatees for layoff absent their union activities. For example, in testifying about the April layoff, wherein Mattei, Wallace and Cole were the only three employees selected, Hager was unable to recall any details of any discussion, wherein it was decided that these three would be the ones to be laid off or which classifications would be included. When  
 15 pressed further, Hager testified that the loss of 40 hours of work per week (the loss of the account that motivated the layoff) translated to a loss of a press crew a week. When pressed further, Hager conceded that a press crew is normally four employees, one lead pressman, two second pressmen and one roll tender. Hager further contends that his alleged recommendation that a crew (4 employees) be laid off that somehow that number was reduced to three. Hager  
 20 speculated that Respondent did not layoff a roll tender because Respondent needed the roll tender somewhere else or someone had left. However, he could not recall whether any specific roll tender had been initially selected for layoff or when and how the decision not to layoff any roll tenders was made.

Hager gave no testimony as to how or who made the decision of which classifications of employees were to be laid off in the June layoff although it appears from an email that Valentine, after consulting rating sheets, made specific recommendations to Hager, which he accepted for the most part. Notably, Valentine did not testify, so there is no evidence how these decisions were made, including how Valentine decided which classifications to include and how  
 30 or why he selected the amounts of employee in classifications to be included in the layoff.

There is evidence from Hager's testimony that Valentine recommended to him that the June layoff not involve any first pressmen because he didn't want to lose the most highly skilled employees. Rather, Respondent decided to demote several first pressmen to second pressmen and layoff second pressmen instead. Hager asserts that he accepted Valentine's  
 35 recommendation in this regard for those reasons.

However, this decision in June was inconsistent with Respondent's actions in the April layoff when it did select Mattei, a skilled first pressman, for layoff. When asked to explain this inconsistency, Hager could give no cogent answer other than that Valentine had not made such a recommendation with the April layoff. Since Valentine did not testify, Respondent provided no explanation as to why Valentine did not recommend keeping all skilled first pressmen in April (when Mattei was laid off) but recommended excluding all first pressman from layoff  
 40 considerations in the June layoffs, but instead demoted several first pressman and laid off second pressmen. Therefore, Respondent provided no explanation for why it did not demote Mattei in the April layoff and layoff another second pressmen as it did in the June layoffs with respect to several first pressmen not alleged as discriminatees.

Additionally, Respondent furnished no testimony from either McNair or Whitmoyer, who  
 50 were both involved in the filling out of the rating sheets as to how and why they filled out their ratings and what considerations they used in making their evaluations. Indeed, there is no testimony from either Whitmoyer or McNair that they did not consider the union activities of the

discriminatees in their evaluations. While I do recognize that Whitmoyer, McNair and Valentine are no longer employed by Respondent that does not preclude it from calling them as witnesses as it did with Cohen, who is also no longer employed by Respondent at the time of the trial. Since it is Respondent's burden of proof that is being evaluated, the absence of probative and important testimony on these issues from these witnesses can be considered in finding that Respondent has failed to meet its burden of proof.

Respondent did present Rittereiser as a witness, but his testimony provides little support for Respondent's defense. To the contrary, his vague, conclusionary, self-serving and inconsistent testimony serves only to undercut Respondent's defense. Essentially, the testimony of both Rittereiser and Hager is that Respondent utilized its "neutral" rating system in order to decide which employees were to be included in the layoffs. They claim that this system was based on the supervisor's honest and reasonable belief as to the abilities of its employees as compared to other employees, who were not selected for layoff. In that connection, in order to meet its burden of proof, Respondent must show that it applied its selection criteria in a consistent manner that would have led to the six discriminatees being selected for layoff in any event. *Bruce Packing*, supra, 357 NLRB #93 slip op at 3.

Rittereiser's testimony demonstrates that Respondent has not done so. Rittereiser claims that he considered employees' past disciplinary records in making his comparative evaluations for his scores, but admits that he did not look at the personnel file for all employees' rates, but only of the employees where he recalled that they had disciplinary write-ups. Thus, Respondent did not show that the six discriminatees had worse disciplinary, attitude or reliability problems than the other employees, who were not selected for layoff. *Bruce Packing*, supra at 3-4.

Further, Rittereiser testified that he did not consult with the direct supervisors of any of the employees in making his assessments and, as related above, did not review all the personnel files of the employees. He also completed all of the evaluations in a relatively short period of time. This haphazard manner, in which these scores were completed, underscores their unreliability. *Merrill Iron & Steel*, supra, 335 NLRB at 174-175.

Rittereiser testified for example that he rated Mattei a 2 on "technical skills" but other employees rated by him as 3s in that category had higher technical skills than Mattei. Similarly, he testified that he rated Mattei as 2 in "productivity" as compared to higher scored for others because "the same. Everybody was producing better than Bob." This kind of vague, non-specific and conclusionary testimony is illustrative of most of his attempts to justify his comparative evaluation in the various categories on the forms. Thus, Respondent has simply failed to provide adequate justifications for its low ratings for the discriminatees *vis a vis* the employees not selected. *Merrill Iron & Steel*, supra. Thus, this indicates that Respondent utilized its dire financial condition as a means to help rid itself of six leading union supporters. *Merrill Iron & Steel*, supra.

This conclusion is further buttressed by a number of other factors.

Rittereiser's testimony further indicates that he rated Wallace low in productivity and technical skills because he was wondering around the pressroom not being productive and disrupting other people. This testimony is an obvious reference to Wallace's talking to other employees about the Union, concerning which Wallace had been previously warned unlawful, as I have concluded above. Thus, it appears, and I find, that Rittereiser, who conceded that he reviewed files of employees, who had write-ups, had considered the emails, described above, from Valentine and Fredericks describing the confrontation between Wallace and supervisors of

Respondent's about Wallace talking to other employees at work about the Union, disrupting their work and that Wallace was not to be on the floor before his shift was to start. Thus, since based on this finding, Wallace was penalized in the rankings, at least in part, for the exercise of protected conduct, i.e. talking to employees about the Union. This finding alone is sufficient to

5 undermine Respondent's defense *vis a vis* its *Wright Line* burdens as to Wallace. That conclusion is further supported by the fact that Whitmoyer, who did not testify, but who also rated Wallace poorly, would likely have considered this protected conduct of Wallace. It was Whitmoyer himself, who unlawfully warned Wallace not to appear on the floor before his shift, told him not to disrupt employees and unlawfully threatened to write Wallace up if he continued

10 to violate Whitmoyer's instructions in that regard. In such circumstances, I infer that Whitmoyer scores on Wallace's evaluation were reduced, in part, due to Wallace's exercise of protected conduct, which further supports my conclusion that it has failed to establish that it would have laid off Wallace absent his protected activities.

15 I conclude similarly with respect to Cole. Thus, Rittereiser testified that he was aware and considered the fact that Cole had an "insubordination issue" with Valentine in his assessment of Cole's scores. He further testified that he reviewed write-ups in personnel files of such incidents. Thus, this leads me to conclude, which I do, that he read and considered Valentine's performance note relating to the incident of March 1 in rating Cole's performance.

20 As I have noted above, that incident reflected a warning given to Cole by Valentine for alleged "insubordination" for using his cell phone while at work.

As related above, I found that this warning by Valentine was discriminatorily motivated. I further found that during the course of the meeting, wherein Cole was given this warning, Cole

25 engaged in protected conduct by complaining about working conditions and how employees were treated by Respondent's supervisors (the "three amigos"). At that point, in response to that protected conduct, Respondent, by Valentine, further committed conduct that would be violative of the Act by telling Cole "to walk out the door" if he didn't like working for Respondent, which amounts to an implied threat of discharge.

30 In view of these findings, it is apparent that Respondent's decision to include Cole in the layoff was tainted by its consideration of the unlawfully motivated warning, which included Cole exercising additional protected conduct, which resulted in an unlawful threat, in Respondent's process of ranking its employees for layoff selection. Thus, this evidence is sufficient in itself to

35 undermine Respondent's defense that it would have laid off Cole absent his protected conduct.

Finally, I also rely upon the fact that Respondent failed to even consider evaluating its Voorhees employees for the purposes of effectuating the April and June layoffs. Hager

40 explained that the decision to confine the layoffs to Secaucus employees was primarily because the main reason for the layoffs was the loss of two major clients, whose work was performed at Secaucus. While this explanation appears on the surface to be reasonable, it is undercut by the additional evidence that during the period of time of the layoffs (March through June) Respondent was in the process of "rebalancing" the work between the two facilities. This process involved the transfer of 15 accounts from Secaucus to Voorhees and one account from

45 Voorhees to Secaucus. This leads to the obvious question as to why would Respondent be transferring work from 15 accounts performed at that Secaucus facility (where there is a union campaign in progress) to the Voorhees facility (where there was no campaign at the time) and while laying off employees only at Secaucus and not even considering Voorhees employees in its allegedly neutral and fair evaluation procedures for determining who is to be laid off. Hager

50 did attempt to explain Respondent's reasoning in this regard when he was asked why Respondent didn't decide to include Voorhees workers in the evaluation process. He asserted that Respondent was attempting to fill in more hours on unused presses in Voorhees. When



asked why not just layoff Voorhees employees in the event, he replied that Voorhees did not have full shifts, so he needed to balance work out because it is inefficient to shut down a press because it would have some work. Thus, Hager explained that he felt that he wanted to make sure crews were filled more efficiently. I find this convoluted explanation perplexing and unpersuasive. I see no direct connection between full shifts and layoffs since hours and shifts could be adjusted accordingly. Further, evidence establishes that Secaucus contained newer, more expensive presses and presumably more efficient presses, so it would seem to make more economic sense to have more work performed on the Secaucus presses rather than at Voorhees. Of course, there are undoubtedly numerous issues that go into deciding on where to perform the particular jobs involved, including for instance, the geographical location of the customer. Indeed, Hager testified that one of the reasons for the new presses being purchased was because they were better suited for larger jobs for clients, located in areas closer to the New York Metropolitan area, where Secaucus has greater proximity than Voorhees.

Respondent adduced no testimony from Hager or anyone else as to why any of these specific 15 accounts were transferred at the time of the layoffs of Secaucus employees. I find that Respondent failed to adequately explain its decision to exclude the Voorhees employees.

Nonetheless, the bottom line is that during the period of time when both layoffs were being effectuated, Respondent was transferring work for 15 accounts previously performed at Secaucus (the plant, where union organizing was being conducted) to a plant in Voorhees, where no union organization was in progress during the process of evaluation for layoff selection. This is further evidence undercutting its burden of proving that it would have selected the six discriminatees for layoff absent their union activities.

Therefore, based on the foregoing reasons, I conclude that Respondent utilized its severe financial problems in the spring of 2010 as a means to rid itself of six known adherents. *Merrill Iron & Steel*, supra at 175. I further find that Respondent has failed to establish that the layoffs of the six discriminatees would have occurred in the absence of their union activity. Therefore, the layoffs are violative of Section 8(a)(1) and (3) of the Act. *Merrill Iron & Steel*, supra (violation found where respondent selected four union adherents for layoff despite finding that respondent's decision to effectuate layoffs was motivated by economic considerations); *Bruce Packing*, supra, 357 NLRB #93 slip op p.3-4 (employer laid off 42 employees, decision to layoff employees was not alleged to be unlawful and found to have been economically motivated; however, the selection of 4 known adherents for inclusion on list found to have been unlawful since anti-union animus was a motivating factor in the selection of the four employees for layoff and employer failed to prove that these employees would have been laid off even in the absence of their union activity); *Hinkle Metal Supply Co.*, 305 NLRB 522, 523 (1991) (Board finds that although respondent had valid economic reasons for effectuating a layoff, its motivating factor in selecting for layoff six employees from among those laid off was their union activities); *JAMCO*, 294 NLRB 896 (1989), enfd. 927 F.2d 614 (11<sup>th</sup> Cir. 1991) (employer's decision to implement a layoff was not unlawful but its selection of certain employees was discriminatorily motivated); *Sumco Mfg. Co.*, 251 NLRB 427 (1980), enfd. 678 F.2d 46 (6<sup>th</sup> Cir. 1982) (while layoff of employees was prompted by large inventory and slowdown of orders, the selection of six employees was discriminatorily motivated in violation of Section 8(a)(1) and (3) of the Act).

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondent has violated Section 8(a)(1) and (3) of the Act by its selection of employees Mattei, Wallace, Cole, Fego, Amato and Ball for layoffs as alleged in the complaint.

## CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by threatening employees with plant closure if they engaged in union activities or supported the Union.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by laying off Kevin Cole, Robert Mattei, Joseph Wallace, Christopher Amato, Henry Ball and Richard Fego because they engaged in union or other concerted, protected activities.

5. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully laid off employees Kevin Cole, Robert Mattei, Joseph Wallace, and Henry Ball, it must offer them reinstatement. It also must make whole Cole, Mattei, Wallace and Ball, plus Christopher Amato and Richard Fego for any loss of earnings and other benefits.<sup>57</sup> Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>58</sup>

## ORDER

The Respondent, AFL Web Printing, Secaucus, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees if they engaged in activities on behalf of the Union.

<sup>57</sup> Fego and Amato have been reinstated by Respondent.

<sup>58</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Selecting employees for layoff or otherwise discriminating against employees for supporting the Union or any other labor organization.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the this Order, offer Kevin Cole, Robert Mattei, Joseph Wallace and Henry Ball full reinstatement to their former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Kevin Cole, Robert Mattei, Joseph Wallace, Christopher Amato, Henry Ball and Richard Fego whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

(c) Within 14 days from the date of the this Order, remove from its files any reference to the unlawful selection of Cole, Mattei, Wallace, Amato, Ball and Fego for layoff, and within 3 days thereafter notify the employees in writing that this has been done and that the layoffs will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Secaucus, New Jersey facility copies of the attached notice marked "Appendix."<sup>59</sup> Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any

<sup>59</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

time since April 2, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 27, 2012

\_\_\_\_\_  
Steven Fish  
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT threaten you with plant closure if you engage in activities on behalf of the Union.

WE WILL NOT select you to be laid off or otherwise discriminate against you for supporting the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of this Order, offer Kevin Cole, Robert Mattei, Joseph Wallace and Henry Ball full reinstatement to their former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Kevin Cole, Robert Mattei, Joseph Wallace, Christopher Amato, Henry Ball and Richard Fego whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful selection for layoff of Kevin Cole, Robert Mattei, Joseph Wallace, Christopher Amato, Henry Ball and Richard Fego, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the layoffs will not be used against them in any way.

AFL Web Printing Co.

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

20 Washington Place, 5th Floor  
Newark, New Jersey 07102-3110  
Hours: 8:30 a.m. to 5 p.m.  
973-645-2100.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 973-645-3784.